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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

J.V. PETERS & COMPANY, an Ohio Partnership, and
DAVID B. SHILLMAN
Petitioners,

vs.

UNITED STATES OF AMERICA,
CAROL BROWNER, Administrator of the
U.S. ENVIRONMENTAL PROTECTION AGENCY, and the
U.S. ENVIRONMENTAL PROTECTION AGENCY
Respondents.

PETITION FOR WRIT OF CERTIORARI
United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED

1. Whether the doctrine of relation back permits the United States Environmental Protection Agency to recover civil penalties from private parties despite deliberately failing to sue those parties within the applicable statute of limitations where, despite its "basically inexcusable conduct," the agency was granted leave to file an amended complaint after the limitations period expired, but failed to do so for more than 21 months after the limitations period expired?

2. Whether the Fifth Amendment to the United States Constitution prevents the United States of America from recovering a civil penalty from parties who were sued nearly two years beyond the statute of limitations where the Government failed to make even a *prima facie* case that these parties had violated the regulations at issue, or that they were subject to a civil penalty?

PARTIES

Petitioners are J.V. Peters & Company, an Ohio partnership, and David B. Shillman, an individual. Respondents are the United States of America, the U.S. Environmental Protection Agency and Carol Browner in her official capacity as Administrator of the U.S. Environmental Protection Agency. None of the petitioners have parent companies or subsidiaries.

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CITATIONS TO PRIOR OPINIONS

The decision of the United States Court of Appeals for the Sixth Circuit rendered on June 29, 2000, and from which this appeal is taken, was not recommended for publication but is cited in a table of unreported decisions at 221 F.3d 1336 and may be found at 2000 WL 923761 (June 29, 2000).

The initial decision of the Administrative Law Judge rendered on May 15, 1985 is also unreported, but may be found in 1985 WL 57141 (EPA). The EPA's Chief Judicial Officer's decision reversing and remanding the ALJ's decision is unreported, but may be found at 1986 WL 69028 (May 9, 1986). The Chief Judicial Officer's decision affirming his reversal on reconsideration is likewise unreported, but may be found in 1986 WL 69034 (October 23, 1986). The ALJ's decision dismissing EPA's case with prejudice is unreported totally. His decision to reinstate the case and have EPA's "second amended complaint" be deemed filed is likewise unreported totally. The ALJ's decision granting EPA's Motion for Accelerated Decision is unreported. The EPA's Chief Judicial Officer's decision on appeal, affirming the ALJ's decision, is unreported, but may be found at 1990 WL 303851 (Aug. 7, 1990). The decision of the United States Court of Appeals for the Sixth Circuit remanding the appeal from the Chief Judicial Officer's decision to the U.S. District Court for the Northern District of Ohio may be found at 923 F.2d 954 (unpublished opinion). The decision of the U.S. District Court for the Northern District of Ohio in Case No. 1; 90 CV 2246 (Manos, J.) reversing and remanding the Chief Judicial Officer's decision dated August 7, 1991 is not reported. The decision of the ALJ after remand is unreported, but may be found at 1995 WL 442019 (July 18, 1995). The decision of the Environmental Appeals Board affirming the ALJ's decision is not reported, but may be found at 1997 WL

221388 (April 14, 1997). As noted above, the decision of the U.S. District Court affirming the Environmental Appeal's Board's decision is not reported. Shillman *et al.* v. United States of America *et al.*, Case No. 97 CV 1355 (January 14, 1999). All such opinions are included in the Appendix hereto.

JURISDICTION

This Court has jurisdiction under Article III to the United States Constitution, 28 U.S.C. § 1254, and Sup. Ct. R. 10 to consider and grant this Petition for a Writ of Certiorari. The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 29, 2000, and this Petition for a Writ of Certiorari is being filed within 90 days of that date pursuant to, and consistent with, Sup. Ct. R. 12, 21 and 29.

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property,

> without due process of law; nor shall private property be taken for public use, without just compensation.

Title 28, Section 2462 of the United States Code reads as follows:

> Except as otherwise provided by Act of Congress, an action, suit, or proceeding for the enforcement of a civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

Title 42, Section 6928(a) of the United States Code (part of the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.*) reads in pertinent part at the time the complaint was filed against Petitioners as follows:

> Whenever on the basis of any information the Administrator determines that any person is in violation of any requirement of this subchapter, the Administrator may issue an order requiring compliance immediately or within a specific time period . . . If such violator fails to take corrective action within the time specified in the order, he shall be liable for a civil penalty of not more than $25,000 for each day of continued noncompliance . . .

STATEMENT OF THE FACTS

On April 17, 1981 the United States Environmental Protection Agency ("EPA") filed an administrative complaint against, and assessed a $25,000 civil penalty to, non-petitioner J.V. Peters & Co., Inc., an Ohio corporation ("Peters"). The penalty was based on Peters' claimed violations of EPA's "interim status standards" at a solvent reclamation facility in Geauga County, Ohio.[1],[2] Peters filed an answer with EPA's Region V hearing clerk in Chicago in accordance with EPA's procedural rules.[3] Peters denied violating any of the interim status standards and its

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[1]. The EPA's complaint was filed pursuant to 40 C.F.R. § 22.13 (1981). The EPA enacted so-called "interim status standards" in May 1980 pursuant to Section 3005(a) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6925(a). These regulations imposed operating standards on facilities engaged in the "treatment storage or disposal of hazardous waste." *See*, 40 C.F.R. Part 265. In addition, owners or operators of such facilities were required to have "a permit issued pursuant to this section." 42 U.S.C. § 6925(a). The permit was divided into two parts, A and B. "Part A" was a registration form and had to be filed by a certain date. Upon timely submission of Part A, an existing facility was accorded "interim status," meaning it could continue to operate until, and unless, EPA denied its "Part B" application. 42 U.S.C. § 6925(e); 40 C.F.R. § 270.70 (1980). An entity with "interim status" was required to submit a Part B application when required by EPA. The Part B application required a great deal of information about a facility including detailed information about wastes stored and processed at the site, and plans and facilities for preventing environmental contamination. *See*, 40 C.F.R. Part 270. The facility in question filed a timely Part A application and was operating as if "having been issued a permit" when the alleged violations occurred. 42 U.S.C. § 6925(e); 40 C.F.R. § 270.70 (1981).

[2]. The alleged violations of the "interim status standards" were observed by an agent for the Ohio EPA on December 17, 1980. The Ohio EPA did not have any enforcement authority under RCRA at the time. *See*, 42 U.S.C. § 6926 and 40 C.F.R. Part 271 relating to state enforcement programs.

[3]. These rules are set forth in 40 C.F.R. Part 22 (1999) entitled, "Consolidated Rules of Practice Governing the Administrative Assessment of Civil

liability for the proposed $25,000 penalty. In fact, Peters did not exist when the claimed violations giving rise to the proceeding occurred (December 17, 1980). Peters was incorporated on January 31, 1981.

About a month later, Petitioner David B. Shillman, Peters' then-president, informed EPA that a partnership called J.V. Peters & Company owned and operated the facility when the claimed violations occurred. Shillman also told EPA that Peters was formed on January 31, 1981. At about the same time, EPA learned the Ohio EPA had filed suit against Peters, J.V. Peters & Company (the partnership) and David Shillman for violations of state law at the facility.[4] Despite this knowledge, EPA elected not to amend its complaint.

An administrative law judge was appointed pursuant to 42 U.S.C. § 6928(b). However, EPA took no steps to prosecute the complaint. On September 20, 1983, 28 months after filing the complaint, EPA filed a "Motion for Leave to Withdraw Administrative Complaint" without prejudice pursuant to 40 C.F.R. § 22.14(e) (1983).[5] Peters did not object and the case was dismissed.

Penalties and the Revocation and Suspension of Permits."

[4]. Petitioner Shillman was not a partner in J.V. Peters & Company. The partners were non-petitioners Dorothy L. Brueggemeyer, Shillman's wife, and non-petitioner John Vasi, now deceased.. Shillman has readily acknowledged he was the manager of the facility on December 17, 1980.

[5]. In its motion to dismiss, EPA said it did not "intend to waive, discharge, or otherwise dispose of any claims it may have against J.V. Peters and Co., Inc. or any officer, agent, employee, successor or assigns thereof." The EPA made no mention of *predecessors* in interest.

Approximately five months later (specifically on February 3, 1984) EPA re-filed the complaint, again naming only Peters as the respondent.[6] Peters answered and denied any violations by Peters of the interim status standards on December 17, 1980 (as it did *not* exist on that date). Peters asserted as an affirmative defense that EPA had failed to name one or more necessary parties; however, it did not expressly identify in its pleading that J.V. Peters & Co. or Mr. Shillman (or anyone else for that matter) *could* be liable for the violations and the proposed penalty.[7]

Thereafter, in response to discovery, Peters provided its articles of incorporation and other corporate documents to EPA showing Peters did *not*, in fact, exist on the date of the alleged violations. The EPA still made no effort to amend its complaint to add either the partnership or Shillman as respondents.

On October 23-25, 1984 the ALJ conducted a hearing on EPA's complaint. In his opening statement, EPA's counsel acknowledged the facility at issue was originally operated by J.V. Peters & Company, a partnership, and expressed his understanding that Peters, the corporation, later came to operate it. After EPA rested, Peters moved for a directed verdict on the grounds Peters did not exist on the date of the supposed violations (December 17, 1980) and therefore, given the

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[6]. While EPA styled its refiling as a "First Amended Complaint," it was, in fact, a new complaint since the original complaint had been dismissed without prejudice. The refiled complaint was assigned the same case number by the hearing clerk in EPA's Region V in Chicago.

[7]. This fact was relevant to the manner in which the United States Court of Appeals for the Sixth Circuit decided the case on June 29, 2000, as we will show below.

evidence, was not liable for the acts of the predecessor partnership.[8] After the ALJ denied Peters' motion, Peters presented uncontradicted evidence that it was incorporated on January 31, 1981, nearly 45 days after the purported violations. Evidence was also presented that the partnership called J.V. Peters & Company operated the facility on December 17, 1980, and that Shillman managed the facility for the partners, Dorothy L. Brueggemeyer and John Vasi.

Nearly six months after the hearing was concluded (specifically on April 15,1985), and after Peters and EPA had filed proposed findings of fact and conclusions of law, EPA filed a "motion to conform pleadings to the proofs." The EPA sought, for the first time, an order that the complaint be "deemed amended to reflect the personal liability of David B. Shillman and the liability of the partnership known as J.V. Peters [&] Company."[9] In response, Peters pointed out that neither Shillman nor the Partnership had ever been made parties to the case, nor had they been given any opportunity to defend themselves. Accordingly, Peters asserted that any order directed at them, without naming them as parties and affording them basic due process rights, would be unlawful.

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[8]. As EPA's Chief Judicial Officer later noted, no attempt was made during the hearing to establish facts that *could* make the corporation liable for the acts of the partnership.

[9]. The EPA said its motion was "precautionary . . . only" since it had orally moved to "conform the pleadings to the evidence" at the October 1984 hearing. However, as EPA's own Chief Judicial Officer, Ronald McCallum, observed in initially reversing the ALJ's decision, EPA's "oral motion" did not relate to adding parties to the case at all. Rather, in response to an objection about evidence regarding possible interim status standards at the facility on a date other than December 17, 1980, EPA's counsel said that "to the extend Mr. English is insisting on strict rules of pleadings [sic] . . . the record should reflect that the evidence and the pleadings be allowed to conform themselves." (Tr. 43).

Peters also pointed out that "[i]f [EPA] wished to sue Mr. Shillman or the partnership, [EPA] should have done so."[10, 11, 12]

The ALJ did *not* grant EPA's motion and, most certainly, neither Shillman nor the partnership were made parties.[13] Nevertheless, on May 15, 1985, the ALJ held them liable for the civil penalty (as well as Peters). *See,* 1985 WL 57141 (EPA). As to Shillman, the ALJ reasoned that

> even though [he is] technically not a party respondent ... [he] was and is so directly connected with the Respondents [sic] interests by his individual interest in the result and by his active participation in the case as to be bound as a party Respondent herein and the assessment of a civil penalty against David B. Shillman, severally and jointly with his partners, if any is appropriate.[14]

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[10]. The EPA did not seek to add Dorothy L. Bruggemeyer as a respondent.

[11]. The term "respondent" means "any person proceeded against in the complaint" (emphasis supplied). 40 C.F.R. § 22.03(a)(1998).

[12]. EPA could still have sued Shillman and the partnership since the statute of limitations had not yet run. The limitations period expired on December 17, 1985, well more than a year *after* EPA filed its motion. *See*, 28 U.S.C. § 6902.

[13]. EPA's Chief Judicial Officer later observed that the "Motion to Amend" was "untimely" and "clearly prejudicial" to the ability of the unnamed parties to "mount a defense."

[14]. The ALJ further reasoned Shillman was liable because the Corporation had hired unspecified "professional advisors" to protect "interests which were, in fact, the interests of Shillman [and because Shillman] participated in the presentation of said defense ... there was no need or necessity to issue a summons for him or to amend

The ALJ reasoned that the partnership could, and should, be held liable for the civil penalty because

> [w]here a corporation is formed by members of a partnership with the intent of shielding partnership members from civil penalty obligations, if a 'mere transformation' is made with the real parties in interest remaining the same, no real change has taken place and creditors may look to the members of the partnership for satisfaction.

EPA's procedural rules allow an appeal to the Administrator. Therefore, Peters, J.V. Peters & Company and Shillman all appealed. Chief Judicial Officer Ronald McCallum was appointed by the Administrator to hear their appeal pursuant to 40 C.F.R. § 22.30 (1986).[15] On May 9, 1986 Chief Judicial Officer McCallum issued a remarkably blunt, but wholly appropriate opinion. *Inter alia*, McCallum said:

> [EPA] has not offered an excuse for its lack of diligence in seeking to amend the complaint to add the unnamed parties. There were several opportunities to name the proper parties in the complaint prior to the hearing. In its original complaint, despite implied notice of the unnamed parties' relationship to the operation . . . [EPA] named only the corporation as

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pleadings to make [him] a new party as he was already a party appearing in the case by counsel."

[15]. All such appeals are now taken to the Environmental Appeals Board ("EAB").

party-respondent. [EPA] failed to amend its complaint after being expressly told by Shillman, during a settlement conference in the summer of 1981, that the business had been incorporated in late January, 1981. . . (footnote omitted) The unnamed parties were not added to the amended complaint, filed on February 2, 1984, despite Complainant's awareness of related litigation in State of Ohio v. J.V. Peters and Co., Inc., *et al.*, Slip op. No. 81 M 272 (Geauga Co. C.P., May 29, 1981) naming the corporation, the partnership, and Shillman as parties-defendant and holding Shillman and the corporation jointly and severally liable for a civil penalty of $15,000.00 (footnote omitted). The complaint was not amended despite [EPA's] receipt of Respondent's Articles of Incorporation, dated January 31, 1981, pursuant to a discovery request.

[EPA] also offers no excuse for failing to move to amend the Complaint during the hearing, following Respondent's motion to dismiss the complaint on the grounds that the corporation did not exist on the date of the alleged violations. Although the Presiding Officer and [EPA] both referred in passing to. . .the potential applicability of the equitable doctrine of 'piercing the corporate veil,' neither one developed this point during the hearing so as to place Shillman and the partnership on notice that they should present a defense to their potential liability. In fact, the Presiding Officer requested that the parties defer discussion of this issue until their post-hearing submissions.

Further, [EPA] offers no excuse for failing to move promptly after the hearing to amend the pleadings to conform to the evidence. The hearing was held in October 1984 but [EPA] did not take action until approximately five months later when the parties received a letter from the Presiding Officer, dated March 28, 1985, requesting clarification of [EPA's] oral motion to amend offered during the first day of the hearing . . . [EPA] responded by filing its written Motion to Amend on April 16, 1985, seeking to add Shillman and the partnership as parties-respondent to the complaint. . . [EPA] sought to relate its written motion back to the first day of the hearing, thereby helping to mitigate against its untimeliness. This attempt to bootstrap the written motion with something that was done at the hearing is not persuasive for the oral motion was directed at an entirely different subject matter . . . **Thus, despite ample knowledge and opportunity throughout these proceedings, fair notice comporting with Federal notions of due process was never given to the unnamed parties as to their potential liability, nor has [EPA] offered any excuse for the untimeliness of its written Motion to Amend.** (emphasis provided; underling in original).

* * * * *

. . . [The fact that Shillman] participated as a witness in the defense of the corporation [does not] either alone or in conjunction with findings purporting to identify Shillman as the real party in interest . . . justify holding

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> [him] liable without first filing charges against him and giving him an opportunity to answer these charges, including the right to present evidence at a hearing to refute the charges that he is in fact the real party in interest. . . I am persuaded that Shillman and the partnership are entitled to nothing less.

McCallum summed up EPA's conduct quite nicely when he concluded that **"EPA's error was basically inexcusable."** (emphasis provided). However, instead of just dismissing the case at that point, McCallum gave EPA "leave to amend" if it wishes to do so. EPA filed a motion for reconsideration in August 1986.[16] On October 23, 1986 McCallum denied EPA's motion and affirmed his order.

In December 1986 the ALJ asked EPA to ". . . advise [him] on or before December 26, 1986 how [EPA] will proceed with the instant case 'in a manner consistent with' [McCallum's order of remand] by advising which, if any, of the options suggested in said option [EPA] will pursue." EPA ignored this order.

Nearly eight months later (on July 27, 1987), the ALJ dismissed EPA's "first amended complaint" filed on April 3, 1984. The ALJ did so because "[EPA has] failed and refused to comply with my said Order. . . and is therefore in default. In the premises, I find that said case should be and it is hereby dismissed with prejudice."

EPA filed a "Motion for Relief from Default Order and Motion for Leave to File Second Amended Complaint" more than 45 days later.

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[16]. Motions for reconsideration are authorized by 40 C.F.R. § 22.32 (1987).

Having already dismissed the case *with* prejudice, the ALJ inexplicably reversed himself and granted EPA's motion. The so-called "second amended complaint" was deemed filed on September 9, 1987.

EPA finally named J.V. Peters & Company, David B. Shillman, Dorothy L. Brueggemeyer, and John Vasi as respondents (in addition to Peters, the corporation).[17] The new parties (except for John Vasi)[18] all answered the complaint, denied having violated the regulations on December 17, 1980, and contested the assessment of the civil penalty. Each of the new parties also asserted the action as to them in light of the five-year statute of limitations in 28 U.S.C. § 6902.

On April 13, 1988 EPA moved for an "accelerated decision" contending the new parties were all "bound" by the ALJ's "findings" based on the October 1984 hearing at which only Peters was a respondent.[19],[20] The new parties opposed EPA's motion and asserted they were each entitled to a hearing at which they could defend themselves from EPA's claims. On September 30, 1988 the ALJ

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[17]. Peters also answered and again denied all liability.

[18]. A default judgment was entered against Mr. Vasi. He has since died.

[19]. An "accelerated decision" is permitted by 40 C.F.R. § 22.20 (1994) which provides, in material part, that such may be granted to any party upon motion if "no genuine issue of material facts exist and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding." This is functionally equivalent to the summary judgment procedure in Fed. R. Civ. P. 56(c).

[20]. EPA claimed respondents Vasi and Brueggemeyer were jointly and severally liable for the $25,000 civil penalty because they were the "owners" of the facility on the date in question. As to Shillman, EPA argued that he was jointly and severally liable for the penalty because he was allegedly "in charge" of the facility on December 17, 1980.

granted EPA's motion as to Shillman, Brueggemeyer, and the Partnership and held them jointly and severally liable for a $25,000 civil penalty. The ALJ found Peters not liable.[21]

The new parties appealed to the Administrator for a second time. This time, the same Chief Judicial Officer affirmed. Judicial review was sought in the United States District Court for the Northern District of Ohio (Case No. 1:90 CV 2246).[22],[23] On August 12, 1991 District Judge John Manos reversed and remanded, finding the Chief Judicial Officer's decision "arbitrary and capricious and in violation of the law." Specifically, Judge Manos held that RCRA

> clearly and unconditionally mandates a hearing wherein each of the respondents, none of whom were represented at the October 1984 hearing, are given the opportunity to present evidence in their own defense. The text of the statute and due process require nothing less.

However, the District Court affirmed the Chief Judicial Officer's conclusion that EPA's claim against the new parties was not time barred because the September 1987 complaint allegedly "related back" to the initial complaint. The District Court mistakenly determined

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[21]. EPA did not appeal the decision in relation to Peters and, accordingly, that part of the case was *finally* over.

[22]. The appeal was initially filed in the United States Court of Appeals for the Sixth Circuit. However, on joint motion, and pursuant to 28 U.S.C. § 1631, the case was transferred to the District Court.

[23]. Such review was sought pursuant to Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706.

that the Chief Judicial Officer had properly applied the doctrine of relation back in F.R.C.P. 15(c) to this action when, in fact, that doctrine had not been applied as this Court instructed in Schiavone v. Fortune, 477 U.S. 21 (1986).[24],[25]

On remand, a new administrative law judge was assigned. On March 18, 1995, more than 14 years since the filing of the initial complaint, EPA filed a "Motion for Leave to Amend" the September 1987 complaint to seek additional civil penalties from Shillman, Brueggemeyer, and the Partnership. EPA was granted leave to file the complaint and the new parties answered. *Inter alia*, they asserted that the new claims, like those previously asserted, were time-barred.

Shortly thereafter, the new parties moved for an "accelerated decision" to dismiss the new complaint on statute of limitations grounds.[26] EPA quickly responded with a "Motion to Voluntarily Withdraw the Third Amended Complaint and [to] Reinstate [its] Second Amended Complaint" purportedly to avoid "any tangential dispute over

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[24]. The new parties initially appealed to the United States Court of Appeals for the Sixth Circuit but withdrew their appeal when EPA stipulated the District Court's decision on that issue was interlocutory in light of the remand order. (Case No. 91-3846).

[25]. The new parties pointed out that the doctrine only applied if EPA mistakenly failed to name them during the limitations period. Since this could not possibly be the case, the doctrine of relation back should not apply.

[26]. Petitioners renewed this argument at the time of the hearing on October 3, 1994 (Tr. at 69-72).

the affect [sic] of the proposed Third Amended Complaint to distract from or delay a hearing on the merits of this case."[27]

The new parties did not object to dismissal of the new complaint, but vehemently opposed "reinstatement" of the September 1987 complaint. Predictably, the new ALJ permitted EPA to withdraw the third complaint and reinstated the September 1987 complaint. By separate order, the new ALJ also held that the September 1987 complaint somehow "related back" to the initial complaint filed by EPA against Peters, alone, on April 21, 1981.

A second evidentiary hearing was scheduled for October 3, 1994.[28] On that date, EPA – which had the burden of production and persuasion – failed to adduce any evidence establishing the claimed violations, the new parties' liability therefor, or the appropriateness of the proposed civil penalty as to any of them. In fact, EPA called just one witness – the original inspector from the Ohio EPA. EPA's examination of this witness was limited to whether she "recalled" testifying at the prior hearing nearly ten years earlier (she did), whether she had "reviewed her testimony" (she had), and whether she would change her testimony "in any way" (she would not).

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[27]. EPA made this argument with a straight face knowing that nearly 14 years had elapsed from the time of the supposed violations.

[28]. The second hearing was held 21 days short of *ten years* after the first evidentiary hearing.

Since EPA failed to establish even a *prima facia* case, the new parties declined to cross examine her.[29] The "hearing" ended.

The new ALJ then issued a decision wherein he concluded the evidence from the original hearing in October 1984 could be "incorporated" in the record against the new parties because they were "given the opportunity to cross-examine the witnesses on their prior testimony and to present evidence on their own behalf" at the October 1994 hearing. Based on the "incorporated" evidence, the ALJ concluded EPA had proved that certain interim status standards had been violated on December 17, 1980, and the new parties were jointly and severally liable for a civil penalty of $23,500.00.[30]

The new parties appealed to the Administrator. On April 14, 1997 the Environmental Appeals Board ("EAB") issued a 40- page decision affirming the ALJ's decision.[31] *See*, 1997 WL 221388 (April 14, 1997). The EAB disclaimed authority to decide the statute of limitations question based on its view that the District Court's 1990 decision was the "law of the case" from which it had no "power to deviate." EAB likewise rejected the assertion that the District Court's

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[29]. In light of EPA's indication that Dr. Homer, its second witness, was being offered solely for cross-examination regarding his testimony at the October 1984 hearing (at which none of the new parties was a party and at only a portion of which David B. Shillman was present as a witness), their counsel informed the ALJ that he did not intend to cross-examine him absent direct testimony. EPA thus opted to not have Dr. Homer attend the hearing.

[30]. The ALJ also affirmed his view that the September 1987 complaint was not time-barred.

[31]. The Environmental Appeals Board is a "permanent body" within EPA. *See*, 20 C.F.R. § 1.25 (1999).

remand order did not permit EPA to rely on evidence adduced in the October 1984 hearing at which Petitioners were not parties.

The new parties again sought judicial review in the District Court pursuant to Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706. The parties filed cross-motions for summary judgment. The new parties asked the District Court to revisit the question of whether the doctrine of relation back saved EPA's September 1987 complaint. They likewise sought a summary judgment on the grounds that EPA failed to prove any violations of the interim status standards by them on December 17, 1980, or their liability for any civil penalty

On January 14, 1999 the District Court granted EPA's motion. The new parties (David B. Shillman, Dorothy L. Brueggemeyer, and J.V. Peters & Company, the partnership) appealed to the United States Court of Appeals for the Sixth Circuit. On June 29, 2000 the Sixth Circuit, 2-1, upheld the District Court's judgment with respect to Shillman and J.V. Peters & Company, but reversed as to Brueggemeyer. *See*, 2000 WL 923761 (June 29, 2000).

David B. Shillman and J.V. Peters & Company now seek review in this Court to decide the important questions presented.

ARGUMENT

I

RELATION BACK DID NOT SAVE EPA'S UNTIMELY AMENDMENT OF ITS ADMINISTRATIVE COMPLAINT FOR CIVIL PENALTIES AGAINST THE PETITIONERS.

The Sixth Circuit, 2-1, seriously erred when it upheld EPA's assertion of claims against parties that were sued 21 months after the statute of limitations had run, and despite EPA's knowledge of these parties well before that limitations period expired. This decision is directly contrary to F.R.C.P. 15(c) and this Court's holding in Schiavone v. Fortune, 477 U.S. 22 (1986). Indeed, it turns to the doctrine of relation back entirely on its head. It must be reversed.

The purpose of a statute of limitations is to prevent stale claims, to ensure fairness, and to prevent surprise from institution of a claim that has been dormant for so long that proof, witnesses and memories have disappeared. Aslanidis v. United States Lines, Inc., 7 F.3d 1067, 1074 (2d Cir. 1993). By the time leave to amend was granted in this case (September 1987), nearly seven years had elapsed, two more than the statute of limitations allowed.

It has been said that "courts generally allow the relation back of amendments to add claims more freely than amendments to add parties." 3 Moore's Federal Practice § 15.19[3][a] at 15-85 (2000). In Schiavone, *supra*, this Court held that relation back applied only in the following circumstances:

> (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake in identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period"

Id. at 28.[32]

The first two factors are not at issue here. In other words, we do not dispute that EPA's "basic claim" against Petitioners arose out of the conduct set forth in the original pleading, and that Petitioners had actual notice of the claim within the five-year limitations period such that they would not be prejudiced in maintaining their defense. However, relation back cannot occur here because none of the Petitioners knew, or should have known, that EPA would have sued them but for a mistake in identity. As we set forth above, EPA clearly knew of the Petitioners well before the statute of limitations expired but obdurately refused, or otherwise failed, to sue them. EPA consciously chose to sue Peters and not the Petitioners. This was not a mistake in identity whatsoever. *See*, Louisiana Pac. Corp. v. ASARCO, Inc., 5

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[32]. While this Court held in *Schiavone* that the party to be brought in must have received notice such that it would not be prejudiced in maintaining its defense within the statute of limitations, that rule has now been changed by F.R.C.P. 15(c)(3) which now provides that such notice must be provided within 120 days after filing the complaint. The requirement that a party (such as the Petitioners in this instance) have known about, or should know about, a mistake in identity *within the limitations period* remains sound law.

F.3d 431, 434 (9th Cir. 1993);[33] In re Integrated Resources Real Estate Ltd. Partnership Sec. Litig., 815 F. Supp. 620, 648 (S.D. N.Y. 1993); *See*, too, Levy v. United States General Accounting Office, 175 F.3d 255 (2nd Cir. 1999)(amendment sought to avoid statute of limitations was not the type of "mistake" contemplated by F.R.C.P. 15(c)(3)(B).[34]

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[33]. This case is analytically very similar to the one at bar. Asarco sold copper slag to a subsidiary of Industrial Mineral Products ("IMP"). IMP in turn sold it to logyards (and split the proceeds with Asarco). The logyards used the slag as a base for equipment operations. The logyards eventually discovered heavy metals were leaching from the slag, contaminating groundwater. The owners and operators of the logyards brought an action under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. ¶¶ 9601 *et seq.* against Asarco. Asarco filed a third party complaint against L-Bar Products, Inc., claiming it was a successor-interest to IMP (since L-Bar had purchased IMP's assets). Asarco later moved to add IMP as a party defendant. While the motion to amend was granted, IMP was later granted summary judgment because a Washington statute provided that no action could be brought against it more than two years after it was dissolved. The amended pleading was filed more than two years after IMP was dissolved. Id. at 433. Asarco argued this was error, since its claim against IMP allegedly related back to when it first impleaded L-Bar Products, Inc. (as IMP's alleged successor-in-interest). The Ninth Circuit rejected this assertion based on the third factor in Schiavone, *supra*. The Ninth Circuit held that Asarco needed to prove that (1) it made a mistake of identity in failing to sue IMP when it sued L-Bar and (2) IMP knew or should have known, by the time the limitation period expired, that Asarco had made the mistake. Id. at 434. Rejecting Asarco's argument, the Court said: "Asarco didn't make a mistake. It knew who those parties were and made a mistake in who it determined it ought to sue under the circumstances. This mistake under Rule 15(c) has to be as to identity, and there was no mistake as to the identify of IMP." Ibid. Just like Asarco, EPA made no mistake here. It knew who Petitioners were and of their relationship to the facility at issue well before December 17, 1985. *If* it made *any* mistake by failing to sue Petitioners within the statute of limitations, that mistake was not one of identity, the *only* mistake which justifies relation back after the statute of limitations has expired. Shiavione, *supra* at 28.

[34]. The Advisory Committee Notes to F.R.C.P. 15(c) properly characterizes the rule as dealing with "the problem of a misnamed defendant." An amendment subject to the rule is a "name-correcting amendment." Id. "The rule is meant to allow

The doctrine of relation back simply does not give a party – including an agency of the United States Government – the right to pursue claims after the applicable statute of limitations has expired when it is beyond dispute that the agency was *never* mistaken about the identity of the omitted parties, much less within the limitations period.[35]

Ironically, and consistent with Shiavione, *supra*, the Sixth Circuit has repeatedly held that a complaint cannot be amended to add a party after the statute of limitations runs except where such is to correct a misnomer as to an existing party. Ringrose v. Engelberg Huller, 692 F.2d 403, 405 (6th Cir. 1982); Lovelace v O'Hara, 985 F.2d 847, 850 (6th Cir. 1993)(A mistake in identity is a prerequisite in order for the doctrine of relation back under Rule 15(c) to apply). In fact, it is well settled that "[a] potential defendant who has not been

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an amendment changing the name of a party to relate back to the original complaint only if the change is the result of an error, such as misnomer or misidentification." Barlow v. Wethersfield Police Dept., 66 F.3d 466, 469 (2d Cir. 1995), *modified*, 74 F.3d 1366 (1996).

[35]. The District Court relied on an alleged "identity of interests" between Peters, the corporation, and the non-named parties. This analysis reveals a fundamental misapprehension of Shiavione. Whether parties have an an "identity of interest" is relevant only to "whether the party to be brought in . . . received such notice that it will not be prejudiced in maintaining its defense." Shiavione, *supra* at 21. The "identity of interests" concept is based on a presumption that one so closely aligned with a named defendant would suffer no prejudice if brought into the case after the statute of limitation ran. As we have repeatedly stated, this is *not* at issue in this case. The "identity of interests" analysis is, however, simply irrelevant to the third Schiavone factor, *viz.* that but for a mistake in identity occurring within the limitations period, EPA would have sued the omitted parties within the statute of limitations. This factor must *also* be satisfied. Schiavone, *supra* at 28; Cox v. Treadway, 75 F.3d 230, 240 (6th Cir. 1996)("the requirements of Fed. R. Civ. P. 15(c) must be met in order for the amendment adding the named defendant to relate back to the filing of the original complaint").

named in a lawsuit by the time the statute of limitations runs is entitled to repose - unless it is or should be apparent to that person that he is the beneficiary of a mere slip of the pen, so to speak." Rendall-Speranza v. Nassim, 107 F.3d 913, 918 (D.C. Cir. 1997). A broader rule would result in a "harvest of uncertainty." Id.

Prior to the decision in the case *sub judice*, the settled law in the Sixth Circuit was that "an amendment that adds a new party creates a new cause of action and there is no relation back to the original filing for purposes of limitations." Marlowe v. Fisher Body, 489 F.2d 1057, 1064(6th Cir. 1973); Smart v. Ellis Trucking Co., 580 F.2d 215, 218 (6th Cir. 1978), *cert. denied,* 440 U.S. 958 (1979); In Re Kent Holland Die Casting & Plating, Inc., 928 F.2d 1448 (6th Cir. 1991); Collyer v. Darling, 98 F.3d 211, 220 (6th Cir. 1996), *rehearing and suggestion for rehearing denied, cert. denied,* 520 U.S. 1267, 117 Sup. Ct. 2439 (1997)("such amendments will not survive preclusive application of the statute of limitations unless the amendments are corrections of misnomers," Id. at 220); Simmons v. South Cent. Skyworker's Inc., 936 F.2d 268 (6th Cir. 1991); Allgeir v. United States, 909 F.2d 869 (6th Cir. 1990).

In light of the foregoing, the decision below is of considerable importance. Not only is the decision contrary to established precedent in the Sixth Circuit, it also creates a gaping hole in the law related to the doctrine of relation back. Unless reversed, the decision below will create the very "harvest of uncertainty" that Schiavone and its progeny were designed to avoid.

The majority below sidestepped the relation back doctrine by holding that EPA's April 15, 1984 "motion to conform the evidence to the pleadings," while never granted, was sufficient to allow EPA to

proceed against parties it did not sue until 21 months after the statute of limitations expired.

Worse yet, the majority held that the "motion to conform the pleadings to the proofs" was sufficient even though EPA never filed a proposed pleading. In fact, EPA did not seek leave to file an amended complaint *per se*; instead, it sought, by fiat, to amend the complaint after the fact such that Petitioners could be held liable without any due process. Further, that motion was *never granted*. Instead, EPA was given leave to amend its complaint well after the statute of limitations ran.

While there is authority for the proposition that a timely motion to amend a complaint to name a new party within the statute of limitations obviates the statute of limitations defense otherwise available to that party, this is clearly not what happened in the case at bar. EPA never sought to amend its complaint such that new or even the same claims that had been brought against Peters could be made against Petitioners; instead, EPA sought to have the ALJ hold them liable on the theory that the evidence supported this, even though they had never been given notice or any opportunity to defend.

Based on the foregoing, we respectfully submit there is an overarching need for this Court to review the decision of the Sixth Circuit and state with particularity whether a party such as EPA in this instance may avoid the statute of limitations despite its full knowledge of the identity of the omitted parties.

II

PETITIONERS' RIGHTS TO DUE PROCESS OF LAW WERE VIOLATED WHEN THEY WERE HELD LIABLE FOR CIVIL PENALTIES DESPITE EPA'S FAILURE TO ESTABLISH A *PRIMA FACIE* CASE AGAINST THEM.

Even if Petitioners' statute of limitations argument does not carry the day, EPA still had an obligation to show that violations of the interim status standards occurred on December 17, 1980 and that Petitioners were, in whole or in part, responsible for those alleged violations.

EPA's own consolidated rules of practice establish that EPA has the burden of proof in such proceedings. 40 C.F.R. § 22.24 (1984) ("[EPA] had the burden of going forward with and of proving that the violation occurred as set forth in the complaint and that the proposed civil penalty . . . is appropriate"). At the hearing in October 1994 EPA merely produced a witness, asked her whether she remembered her former testimony ten years before and if she would "change it" and then tendered the witness to Petitioners.

This is clearly insufficient to prove by a preponderance of the evidence that the violations charged in the complaint occurred, that Petitioners were responsible therefor, or that the civil penalty was "appropriate." 22 C.F.R. § 22.24 (1984).

The due process clause of the Fifth Amendment prevents the deprivation of property without due process of law. Greene v. McElroy, 36 U.S. 474 (1959). In this case, the government seeks to extract from Petitioners a so-called "civil penalty" for their supposed involvement in

violating interim status standards at a solvent reclamation facility in December 1980.

Absent review by this Court, the United States will be permitted to take $23,500 from them without even the most basic due process. The only "hearing" they were ever given was a truncated affair in October 1994 (14 years after the supposed violations occurred) when EPA did nothing other than make their witnesses available for cross-examination.

Before the Petitioners may lawfully be held liable for *any* civil penalty, the law requires that EPA make out a *prima facie* case against *them*.[36] EPA claimed such would be difficult due to the passage of time, the fading of memories, *etc.* Of course, this is precisely why statutes of limitation exist and why Petitioner's due process rights were violated in this case.

The District Court and the Sixth Circuit inexplicably determined that the only process due Petitioners under these circumstances was the right to cross-examine two of EPA's witnesses who testified in October, *1984* (ten years earlier) when the only adverse party was Peters. However, this badly misses the point. The right to cross-examination presupposes that an adverse party has at least made a *prima facie* showing that the violations occurred and that the parties from whom civil penalties were sought were responsible. Because EPA completely failed to meet this burden, the Petitioners had no burden and thus did not have to exercise their "right" of cross-examination. The fact that they have

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[36]. Indeed, this is precisely what the relevant rule of procedure provides. *See*, 40 C.F.R. 22.24 (1999).

now been found liable for a civil penalty under these circumstances is particularly grievous.

CONCLUSION

For each of the foregoing reasons, David B. Shillman and J.V. Peters & Company respectfully request that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

NOT RECOMMENDED FOR PUBLICATION

No. 99-32 15

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

		FILED
DAVID B. SHILLMAN;	)	June 29 2000
DOROTHY L.	)	Leonard Green,
BRUEGGEMEYER; and	)	Clerk
J. V. PETERS AND COMPANY,	)	
	)	
Plaintiffs - Appellants,	)	
	)	ON APPEAL FROM
v.	)	THE UNITED STATES
	)	DISTRICT COURT FOR
UNITED STATES OF AMERICA;	)	THE NORTHERN
CAROL BROWNER, Administrator,	)	DISTRICT OF OHIO
United States Environmental	)	
Protection Agency;	)	
and UNITED STATES	)	
ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Defendants - Appellees.	)	
	)	OPINION

Before WELLFORD, SILER, and GILMAN, Circuit Judges.

No. 99-3215
Shillman v. United States

RONALD LEE GILMAN, Circuit Judge. This is a twenty-year old case about a $23,500 administrative fine imposed by the Environmental Protection Agency (EPA). David Shillman, Dorothy Brueggemeyer (Shillman's wife), and J.V. Peters & Co. petitioned the district court for judicial review of the fine levied against them. The EPA moved for summary judgment, which was granted by the district court. For the reasons set forth below, we **REVERSE** the judgment of the district court as to Brueggemeyer and **AFFIRM** its judgment in all other respects.

I. BACKGROUND

In May of 1980, David Shillman leased property in Middlefield Township, Ohio for the purpose of operating a hazardous waste storage and reclamation facility. The facility began operations in June of that year under the name J.V. Peters & Co, a partnership. Its partners were Brueggemeyer and John Vasi. Shillman managed the facility and maintained complete control over its daily operations. Vasi was apparently the cook for the facility's employees. In accordance with the requirements of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6992k, J.V. Peters & Co. applied to the EPA for a permit to treat, store, or dispose of hazardous waste. Under RCRA, J.V. Peters & Co. was allowed to operate the facility while its EPA application was pending. *See* 42 U.S.C. § 6925(e).

In December of 1980, an inspector from the Ohio Environmental Protection Agency (Ohio EPA) visited the facility and identified eighteen violations of RCRA. The inspector's report charged, among other things,

that hazardous wastes were not being stored and handled in accordance with RCRA's requirements, and that J.V. Peters & Co. had totally failed to prepare a contingency plan for emergencies. A copy of the inspector's report was sent to J.V. Peters & Co.

Within two weeks of receiving the report, J.V. Peters & Co. was dissolved by its partners. They formed a corporation, and transferred all of the partnership's assets and liabilities to the corporate entity. The name of the corporation was J.V. Peters & Co., Inc. Shillman became president of the corporation and chairman of its board of directors. Brueggemeyer became its secretary and treasurer, and was also a member of its board of directors. The new corporation's business was identical to that of the partnership it had replaced—managing the Middlefield Township, Ohio facility. If there was any reason for this transaction other than an attempt to evade liability for already-committed or ongoing violations of RCRA, the record fails to reveal it.

In April of 1981, the EPA filed an administrative complaint against J.V. Peters & Co., Inc. based on the Ohio EPA inspector's report, assessing a $25,000 civil penalty. Shillman filed a pro se answer on behalf of J.V. Peters & Co., Inc. He admitted some of the violations, denied others, and demanded a hearing. The case was assigned to an administrative law judge (ALJ).

On September 20, 1983, the EPA filed a "Motion for Leave to Withdraw Administrative Complaint" without prejudice. The ALJ granted the motion. On February 2, 1984, the EPA filed a "First Amended Complaint." The new complaint alleged the same violations,

assessed the same $25,000 penalty, and named the same respondent – J.V. Peters & Co., Inc. – as had the original complaint. This time, J.V. Peters & Co., Inc. was represented by counsel when it answered the amended complaint. Counsel claims that the answer was based in significant part on the fact that J.V. Peters & Co., Inc. did not exist at the time the violations occurred. In fact, the answer simply denies "each and every allegation" in the EPA's complaint without comment, in boilerplate fashion.

The ALJ scheduled an evidentiary hearing, which was conducted between October 23 and October 25. 1984. Following the presentation of the EPA's case, J.V. Peters & Co., Inc. moved for a directed verdict. The ALJ denied the motion. J.V. Peters & Co., Inc. then put on its case, which for the most part consisted of Shillman testifying about the nature and the extent of the violations underlying the EPA's complaint, and about the relationship between J.V. Peters & Co., J.V. Peters & Co., Inc., and the people involved with each.

In April of 1985, the EPA filed a motion captioned as one to "Conform the Pleadings to Evidence" in an attempt to add Shillman and the now-defunct J.V. Peters & Co. as respondents. No attempt was made to add Brueggemeyer as a respondent. The ALJ did not enter an order expressly ruling on the EPA's motion. Instead, on May 15, 1985, he issued an initial decision that found Shillman and J.V. Peters & Co. both liable for the violations, and assessed a $25,000 civil penalty. The respondents appealed the ALJ's decision to the Chief Judicial Officer of the EPA.

On May 9, 1986, the Chief Judicial Officer vacated the ALJ's decision, concluding that Shillman and J.V. Peters & Co. had been denied notice of their potential liability for the penalties and the opportunity to be heard. The Chief Judicial Officer then remanded the case to the ALJ with instructions to allow the EPA to amend its complaint to name Shillman and J.V. Peters & Co. as respondents, and to grant them a hearing to present evidence on their behalf.

In June of 1986, the EPA filed a motion for reconsideration, which the Chief Judicial Officer denied. On December 17, 1986, the ALJ issued an order instructing the EPA to advise him as to how it wished to proceed. When the EPA failed to respond, the ALJ entered an order dismissing the case with prejudice for failing to comply with the order. In September of 1987, the EPA moved for relief from the dismissal. The ALJ granted the motion, permitting the EPA to file a "Second Amended Complaint."

In November of 1987, the EPA filed its Second Amended Complaint, naming as respondents J.V. Peters & Co., Inc., J.V. Peters & Co., Shillman, Brueggemeyer, and Vasi. All but Vasi filed answers denying the allegations. (Vasi, who is now deceased, did not answer. A default judgment was taken against him, and he did not appeal from that judgment.) Once again, the answer filed on behalf of J.V. Peters & Co., Inc. consisted almost exclusively of boilerplate denials and denials of knowledge and information sufficient to respond to the EPA's allegations. The closest its answer came to explaining its theory that J.V. Peters & Co., Inc. was not a proper respondent because it did not exist

when the violations occurred was the conclusory assertion of an affirmative defense based on the EPA's purported failure to join an unspecified indispensable party.

On April 13, 1988, the EPA moved for an accelerated decision (the administrative equivalent of summary judgment) against all of the named respondents on the ground that the testimony and evidence adduced at the hearing in October of 1984 established that they were all liable for the violations. The ALJ, in an order dated September 30, 1988, found Shillman, Brueggemeyer, Vasi, and J.V. Peters & Co. jointly and severally liable for the $25,000 civil penalty. Shillman, the ALJ held, was liable as the facility's "operator," and Brueggemeyer and Vasi (who were the partners in J.V. Peters & Co.) were liable as the facility's "owners." The ALJ did not find J.V. Peters & Co., Inc. liable. Additionally, the ALJ concluded that the statute of limitations defense did not apply to the government and did not apply to the type of civil penalty assessed, because it was remedial and not punitive in nature.

On October 24, 1988, all of the respondents who had been found liable (except for Vasi), appealed the ALJ's decision to the EPA's Chief Judicial Officer. The Chief Judicial Officer affirmed, holding that the EPA's Second Amended Complaint was timely filed because it "related back," in a manner consistent with Rule *15(c)* of the Federal Rules of Civil Procedure. (Although ALJs are not bound by the Federal Rules of Civil Procedure in administrative proceedings, *see Sloan v. SEC.* 547 F.2d 152, *155* (2d Cir. 1976), they may – and frequently do – look to them for guidance, as the Chief Judicial Officer acknowledged.)

On September 4, 1990, Shillman. Brueggemeyer, and J.V. Peters & Co. petitioned this court for judicial review. Pursuant to 28 U.S.C. § 1631, the case was transferred to the United States District Court for the Northern District of Ohio. The district court affirmed the Chief Judicial Officer's conclusions on the statute of limitations issue, but remanded the case to the ALJ on the grounds that Shillman, Brueggemeyer, and J.V. Peters & Co. were entitled to an evidentiary hearing.

On remand, the case was heard by a different ALJ, who determined that he would accept as evidence the testimony adduced at the 1984 hearing. The hearing took place in October of 1994. At the hearing, the EPA did not present any new witnesses, but made the witnesses who testified in 1984 available for cross-examination. Shillman, Brueggemeyer, and J.V. Peters & Co. objected, asserting that the EPA could not prove its prima facie case against them by relying on the prior testimony of the EPA witnesses in the proceeding against J.V. Peters, Inc., but was required to present live testimony. They refused to cross-examine the EPA's witnesses or to present any defense.

In July of 1995, after reviewing the 1984 transcript de novo, the ALJ issued his decision, finding Shillman, Brueggemeyer, and J.V. Peters & Co. jointly and severally liable for the violations that had occurred nearly fifteen years earlier. He assessed a fine of $23,500, concluding that the EPA had not proven one of the alleged violations. The ALJ rejected the argument that the EPA's utilization of the transcripts from the 1984 hearing deprived the respondents of their due process rights. Instead, the ALJ concluded that their rights had been

protected because the respondents were given the opportunity to cross-examine the EPA's witnesses and to present evidence on their own behalf Once again, Shillman, Brueggemeyer, and J.V. Peters & Co. appealed, this time to the Environmental Appeals Board, the successor to the Chief Judicial Officer.

On April 14, 1997, the Environmental Appeals Board issued a decision affirming the ALJ. In doing so. the Board deferred to the district court's conclusion that the EPA's complaint was not time-barred. It ruled that this determination was the law of the case. The Board also rejected the argument that the EPA's use of the 1984 testimony was a violation of due process, concluding that the testimony was "probative, relevant, and reliable," and thus properly admitted.

On May 14, 1997, Shillman, Brueggemeyer, and J.V. Peters & Co. petitioned the district court for review. Subsequently, both they and the EPA filed motions for summary judgment. The district court granted the EPA's motion and denied the petitioners' motion. In doing so, the district court concluded that the EPA's Second Amended Complaint "related back" and was thus timely filed. It also determined that the decision of the ALJ in 1994 to allow the EPA to essentially stand on the testimony presented against J.V. Peters & Co., Inc. in 1984 did not violate the respondents' rights to due process. The district court decided that due process was satisfied because the respondents were accorded an evidentiary hearing at which they had the opportunity to cross-examine the EPA's witnesses and to present evidence of their own.

II. ANALYSIS

A. Pleading strategy

In responding to the EPA's original complaint and first amended complaint, J.V. Peters & Co., Inc. filed answers denying liability, apparently on the theory that it could not be held liable for violations that occurred before it was incorporated, but without hinting at its belief that the EPA had sued the wrong entity. As noted above, the answers simply denied each and every allegation in the complaint in boilerplate fashion. From the record, it appears clear that this strategy was part of an intentional litigation tactic, intended for the benefit of J.V. Peters & Co. as much as for J.V. Peters & Co., Inc. *See* Mem. in Opp. to Mot. for Reconsideration (filed June 24, 1986, purportedly on behalf on J.V. Peters & Co., Inc.) ("[J.V. Peters & Co., Inc.] had no duty to point out to [the EPA] that it had sued the wrong entity . . . Such a defendant has no duty to implead or to affirmatively defend the case on the grounds that someone else is responsible, although it could do so . . . [O]ne must wonder whether [the EPA] is aware of the most basic principles of civil procedure."). J.V. Peters & Co.. of course, has eagerly adopted this argument.

As a matter of basic civil procedure, however, J.V. Peters & Co. is mistaken. *See* FED. R. Civ. P. 8(b) ("Denials shall fairly meet the substance of the averments denied."); *Weade v. Trailways of New England, Inc.*, 325 F.2d 1000, 1001 (D.C. Cir. 1963) (per curiam) (vacating an entry of summary judgment on statute of limitations grounds, concluding that the defendant's blanket denials of "each and

every allegation" in the complaint did not fairly meet the substance of the plaintiffs allegations, and remanding for the district court to consider whether the defendant's failure to give the plaintiff "plain notice" that he had sued the wrong corporation should estop that corporation from defending itself on that basis, and estop the related corporation that should have been named as a defendant from asserting the statute of limitations as a defense); *Eddinger v. Wright*, 904 F. Supp. 932, 935 (E.D. Ark. 1995) (concluding that under Arkansas's substantially identical Rule 8(b). an answer to a negligence complaint that simply denied "that this defendant was in any way negligent with regard to this occurrence" did not "fairly meet the substance" of the complaint, because it did not explain that the defendant's son, Robert A. Wright, and not the defendant, Robert U. Wright, who had been mistakenly served with process, was driving the car at the time of the accident) (internal quotation marks omitted). *See also Zielinski v. Philadelphia Piers, Inc.*, 139 F. Supp. 408 (E.D. Pa. 1956) (estopping a corporate defendant from denying that it was the tortfeasor's employer because, among other reasons, its answer did not make clear that it was denying agency rather than simply denying liability).

In sum, a corporate defendant is not entitled to run interference for a related entity by interposing a boilerplate answer to a complaint and then participating extensively in the litigation, only to later spring the dual defenses that the plaintiff cannot proceed against the named defendant because it is the wrong party and also cannot proceed against the related entity because the statute of limitations has expired. Estopping J.V. Peters & Co., Inc. from denying that it was the owner of the property when the RCRA violations occurred would have been an

appropriate response to this litigation tactic. Another appropriate response would have been to estop J.V. Peters & Co. from asserting a statute of limitations defense.

Finally, we are at a loss to understand why the ALJ did not simply impose successor liability on J.V. Peters & Co., Inc. as the successor to J.V. Peters & Co., consistent with the standard of successor liability that has been applied in CERCLA cases. *See, e.g., B.F. Goodrich v. Betkoski*, 99 F.3d 505, 518 (2d Cir. 1996) (applying the common-law rule that successor liability can properly be imposed if(1) the successor expressly or impliedly agreed to assume the predecessor's liabilities, (2) the transaction is a de facto merger or consolidation, (3) the successor is a "mere continuation" of the predecessor, or (4) the transaction is fraudulent).

We make note of the above points to refute the assertion of J.V. Peters & Co. that it was unfair to let the EPA decide so late in the litigation to proceed against it. Even if we were inclined to accept J.V. Peters & Co.'s argument that the EPA's assertion of claims against it came after the expiration of the limitations period (which we are not), the ALJ would have been fully justified in concluding that J.V. Peters & Co. was estopped from asserting a statute of limitations defense. And the argument of Shillman and J.V. Peters & Co. concerning the allegedly unfair procedures utilized at the 1994 hearing comes with very poor grace, because had it not been for the unreasonable litigation tactics orchestrated by Shillman, there would have been no need for a 1994 hearing. Instead, the liability of all of the potentially responsible parties could have been determined in 1984, if not earlier.

B. Statute of limitations

Shillman and J.V. Peters & Co. argue that the EPA's action against them is barred by the statute of limitations. We conclude that the amended complaint was timely filed, and that the parties' discussion of the "relation back" doctrine is misplaced. The purpose underlying the "relation back" doctrine is to permit amendments to pleadings when the limitations period has expired. *See Hill v. Shelander,* 924 F.2d 1370, 1377 (7th Cir. 1991).

In this case, the EPA filed a motion on April *15,* 1985 that, if granted, would have added Shillman and J.V. Peters & Co. as respondents. The date that the EPA formally requested permission to proceed against those respondents was within five years of the date that J.V. Peters & Co. began operating the site, and was thus within five years of the alleged violations. This satisfies the five-year limitations period that applies generally to "action[s], suit[s] or proceeding[s] for the enforcement of any civil fine, penalty, or forfeiture . . ." 28 U.S.C. § 2462; *3M Co. (Minnesota Mining & Mfg.) v. Browner,* 17 F.3d 1453, 1462-63 (D.C. Cir. 1994) (concluding that § 2462 bars the government from assessing civil penalties under the Toxic Substances Control Act for violations occurring more than five years before the commencement of the EPA proceeding). Although the EPA captioned the motion as one "To Conform Pleadings To Evidence," there can be little doubt that Shillman and J.V. Peters & Co. knew or should have known that the EPA was formally requesting leave to proceed against them.

If a motion to amend is granted, the complaint is deemed amended as of the date the proponent of the amendment sought leave to amend, and not when the request is actually granted. *See Mayes v. A T&T information Systems, Inc.*, 867 F.2d 1172(8th Cir. 1989) (per curiam). The ALJ never formally granted the request, apparently for no other reason than his understanding that it was unnecessary to do so in order to add Shillman and J.V. Peters & Co. as parties. Holding that the ALJ's understanding was incorrect, the Chief Judicial Officer concluded that the ALJ should have granted the EPA the formal permission that it had sought to proceed against Shillman and J.V. Peters &Co.

Although courts may (and in the ordinary course should) require an amendment's proponent to attach a copy of the proposed amended complaint for filing in the event the motion for leave to amend is granted, "the motion itself may be acceptable so long as it puts the opposing party on notice of the content of the amendment." *Moore v. Indiana*, 999 F.2d 1125, 1131(7th Cir. 1993). Neither Shillman (who, as president of J.V. Peters & Co., Inc., participated actively in the litigation of the EPA's case against the corporation) nor J.V. Peters & Co. argue that the EPA's failure to attach an amended complaint to its motion deprived them of notice either that the EPA was seeking permission to proceed against them, or of what the EPA was seeking to hold them responsible for. Nor did they argue in their opening brief that they were not served with process. *Cf Robinson v. Jones*, 142 F.3d 905, 906 (6th Cir. 1998) (noting that arguments not raised in the proponent's opening brief are deemed abandoned, and will ordinarily not be considered). For all of the above reasons, we conclude that the EPA's action against Shillman and J.V. Peters & Co. was not barred by the statute of limitations.

But the EPA's case against Brueggemeyer is another matter. The EPA's "Motion to Conform Evidence to Pleadings" does not mention her, and it does not appear that the EPA did anything to add her as a party during the five-year limitations period. It seems fairly clear, as she argues in her brief, that the EPA knew within five years of the violations that she was a proper respondent. We thus conclude that the district court erred in not dismissing Brueggemeyer. As a practical matter, though, this may be of no great benefit to her because, under Ohio law, when a partnership has insufficient assets to satisfy a judgment—and it appears that J.V. Peters & Co. has no assets with which to satisfy a judgment—the judgment creditor may initiate an action against the partners to execute the judgment, even if the partner in question could have been made a party to the prior suit against the partnership. *See Heinz v. Steffen*, 678 N.E.2d 264, 269-70 (Ohio Ct. App. 1996).

C. Due process

Finally, we reject the argument that Shillman and J.V. Peters & Co. were deprived of their due process rights because of the ALJ's reliance on the testimony of the EPA's witnesses in the 1984 hearing against J.V. Peters & Co., Inc. Essentially, they assert that all of the evidence presented in the 1984 hearing pertained to the liability of J.V. Peters & Co., Inc., which at the time was hanging its hat on the theory that it could not be liable simply because it had not been formed when the violations occurred in December of 1980. During the proceedings in 1984 (in which Shillman participated as the president and chief executive officer of J.V. Peters Co., Inc.), the EPA produced evidence

of RCRA violations. It is uncontroverted that J.V. Peters & Co. operated the facility at the time the violations occurred and that Shillman managed all of the facility's operations. In the absence of another logical explanation, it is not unreasonable to infer that those who operated hazardous waste facilities at the time that RCRA violations occurred are responsible for the violations.

Shillman and J.V. Peters & Co. (who were and are represented by the same attorney who represented J.V. Peters & Co., Inc. at the 1984 hearing) were given the opportunity to cross-examine the EPA's witnesses, to present evidence that the violations did not occur, or to show that they should not be held responsible if they did occur. They did none of these things. Although Shillman and J.V. Peters & Co. argue that the corporation had no motivation to challenge the evidence because it could never have been held liable for the claimed violations, this is refuted by the uncontested fact that the corporation expressly assumed all of the partnership's liabilities. As noted above, we also have no idea why the ALJ did not impose liability on J.V. Peters & Co., Inc. as the successor to J.V. Peters & Co., consistent with the standard of successor liability that has been applied in CERCLA cases.

For all of the above reasons, we do not believe that the ALJ's decision to admit the testimony from the 1984 hearing was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," S U.S.C. § 706(2), which is the standard by which this court must assess the ALJ's legal determinations. *See National Engineering & Contracting Co. v. OSHA*, 928 F.2d 762, 767 (6th Cir. 1991).

III. CONCLUSION

In summary, the EPA's action against Shillman and J.V. Peters and Co. was timely filed without the benefit of the "relation back" doctrine. The EPA's case against Brueggemeyer is barred by the statute of limitations, although the EPA would presumably be able to proceed against her in an action to enforce any judgment against J.V. Peters & Co. Finally, because Shillman and J.V. Peters & Co. were afforded the right to cross-examine the EPA's witnesses, and the opportunity to present evidence to refute their responsibility for the RCRA violations that concededly occurred at the facility under Shillman's management, their due process rights were not violated by the 1994 ALJJ hearing.

This case has dragged out appallingly. Part of the blame rests with the EPA, whose procedural ineptitude in this action leaves little to be proud of. But a greater portion of the blame for the delay rests with Shillman and the incorporated and unincorporated incamations of J.V. Peters & Co. Fortunately, all litigation must eventually end. This case is no exception. For all of the reasons set forth above, we **REVERSE** the judgment of the district court as to Brueggemeyer and **AFFIRM** its judgment in all other respects.

HARRY W. WELLFORD, Circuit Judge, **concurring in part and dissenting in part:**

This unnecessarily complicated case arises becALJse of clear negligence and misfeasance on the part of representatives of the Environmental Protection Agency ("EPA") in not pursuing adequately claims of improper operation of a hazardous waste storage site in Middlefield Township. Ohio, between *June and December of 1980.* Judge Gilman has carefully set out the series of blunders and missteps committed by the EPA, its representatives, and its lawyers in attempting to levy a fine against the operator of that site in pursuit of the asserted statutory remedy for the alleged violations.

The unfortunate series of events began when the EPA assessed the $25,000 civil penalty (for the alleged 1980 violations) against the corporation which, of course, was not even in existence in 1980. This initial effort was aborted in 1983 by a motion to withdraw the initial Complaint after an answer was filed by the corporation. Over three years after the inspection, the EPA filed a "First Amended Complaint," asserting essentially the same things as the initial withdrawn Complaint, against – once again – *only* the corporation. There was no claim of any personal or partnership liability. Once again, the corporation answered and denied liability.

By the time of the hearing in October of 1984, the EPA had almost four years in which to identify specifically the responsible party or parties, but still sought liability against *only* J.V. Peters & Co., Inc. The EPA's proof at that hearing did not indicate personal liability

against Shillman or his wife, the corporate officers, nor against Vasi, the former partner. The corporation then moved for a directed verdict. I am of the view that it should have been granted. The EPA failed to make out a case for violations when the corporation was not in existence. At that juncture, as Judge Gilman acknowledges, the EPA made no motion at that point to assert possible successor liability against the corporation or to asset personal liability against the corporate officers (and former partners).

Subsequently, the April 1985 motion by the EPA sought to "conform pleadings to evidence." The ALJ hearing the case did not rule upon this EPA motion but held, erroneously in my view, Shillman personally liable, as well as J.V. Peters & Co., the partnership. The apparent basis for this holding, without any advance notice to Shillman or the partnership, was that they should have been named defendants and responsible parties. In 1986, the chief judicial officer of the EPA properly vacated this 1985 decision of the ALJ. This action should have ended the controversy once again; more than five years had passed and the EPA had only named J.V. Peters & Co., Inc. as a defendant and responsible party. Any effort by the EPA to name someone else--Shillman or the partners of J.V. Peters & Co.--would have been a new action, and probably time-barred. The chief judicial officer, however, remanded the case after denying the EPA's motion for reconsideration in 1986 to allow the EPA to amend its complaint against the corporation. In any event, the ALJ, upon remand in 1987, dismissed the case because the EPA failed to file any amendment. This was now some seven years after the alleged violations.

I would hold this action by the ALJ to be correct and a proper dismissal under the circumstances. Not until September of 1987 did the EPA move for relief, again without filing any purported amendment which would give the first notice that it was very belatedly--too late from my perspective--seeking to hold Shillman. his wife, and Vasi responsible personally. I would adjudge the November, 1987 "second Amended Complaint" to be without effect, too late, and precluded by the EPA's ineffectual prior actions over many years.

Shillman is certainly not a paragon of virtue in this case. Had the government made a modicum of effort to discover and assert in a timely fashion the true facts as to responsibility for the 1980 violations, if any, the result, in my view, would have been entirely different. The EPA simply failed in this effort, regrettably, and I have found no effort to explain its deficiencies in the record.

If I am unsuccessful in persuading my brothers to deny the "relief" gratuitously granted the EPA. I would, in any event, deny any interest on the fine asserted against any individual defendant prior to 1994.

I, therefore, respectfully dissent from the decision of Judge Gilman except as to that part denying direct personal liability against Shillman's wife, Dorothy Brueggemeyer.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID B. SHILLMAN, *et al.*,	)	CASE NO.: 1:97CV1355
	)	
Petitioners,	)	
	)	Judge John M. Manos
vs.	)	
	)	
UNITED STATES OF	)	
AMERICA ENVIRON-	)	MEMORANDUM OF
MENTAL PROTECTION	)	OPINION
AGENCY,	)	
	)	
Respondent.	)	

On May 14, 1997, David B. Shillman, Dorothy L. Brueggemeyers, and J.V. Peters & Company, Petitioners, brought this action seeking judicial review of an administrative decision entered against them and in favor of the United States Environmental Protection Agency ("EPA"). Both petitioners and respondent filed motions for summary judgment. For the reason provided below, EPA's motion as to the complaint and counterclaim is granted, and the petitioners' motion is denied.

I. FACTUAL BACKGROUND

Beginning in May 1980, David Shillman leased property located at 17030 Peters Road in Middlefield Township, Ohio. In June of 1980, a Partnership, "J.V. Peters & Company" ("the Partnership") consisting

of Shillman, Dorothy Brueggemeyer (Shillman's wife) and John Vasi, operated a hazardous waste storage and reclamation facility ("the Facility"). Shillman managed the Facility and was in complete control over its daily operations. (Environmental Appeals Board's Final Decision and Order, In re J.V. Peters and Co., RCRA (3008) Appeal No. 95-2, at 6 (Apr. 14, 1997)("EAB Decision").

The Partnership was governed by the "Interim Status Standards" in accordance with the Resource Conservation and Recover Act ("RCRA") § 3005 (e), 42 U.S.C. § 6925 (e).[1] These standards permitted the Partnership to remain operational, as long as it met the requirements specified during this period, while its permit application was being reviewed by the EPA.

On December 17, 1980, a Melinda Becker, an inspector employed by the Ohio Environmental Protection Agency ("Ohio EPA"), inspected the Facility and submitted a report to the United States Environmental Protection Agency (the "EPA") attributing eighteen

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[1]. On May 15, 1980, the EPA promulgated a set of regulations for facilities which stored, treated, or disposed of hazardous materials. The regulations provided that owners or operators of hazardous waste facilities which registered with EPA by November 19, 1980 (through a process called a "Part A application") were automatically entitled to "interim status" until EPA required them to submit a "Part B application". Facilities with "interim status" had to comply with "Interim Status Standards" set forth in 40 C.F.R. Part 260, effective November 19, 1980. The Partnership began operating prior to November 19, 1980, this, it was governed by the Interim Status Standards.

violations of the Interim Status Standards to the Partnership.[2] She also provided a copy of the report to the Partnership.

On January 30, 1981, about two weeks after receiving the report, the Partnership was dissolved and its assets were transferred to an Ohio Corporation, the J.V. Peters and Company, Inc. ("the Corporation"), formed by Shillman and Brueggemeyer. The business of the Corporation was identical to that of the Partnership. Shillman served as the Corporation's president and chairman of the board. Shillman served as the Corporations' president and chairman of the board. Brueggemeyer was its secretary and treasurer. (EAB Decision, at 7).

II. PROCEDURAL HISTORY

On April 17, 1981, the EPA filed an administrative complaint against J.V. Peters and Company and assessed a $25,000 civil penalty against it based upon the findings from the December 1980 inspection, pursuant to 42 U.S.C. § 6928 (a) and 40 C.F.R. § 22.13. On May 12, 1981, Mr. Shillman, in his capacity of president and chairman of the board, answered the complaint. While insisting that the penalty could not stand against the Corporation because it did not exist at the time the

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[2]. Section 3004 of RCRA sets forth standards applicable to owners and operators of hazardous waste treatment, storage, and disposal facilities. See 42 U.S.C. § 6924. Section 3008 of RCRA permits the EPA to order violators to pay a civil penalty for any past or current violation and requires compliance with the order. 42 U.S.C. § 6928 (.)(1). Further, all orders are final unless a public hearing is requested, upon which, the EPA shall conduct a public hearing. 42 U.S.C. § 6928 (b). If any person named in the order fails to comply, the EPA may assess a penalty of up to $25,000 per day of noncompliance as well as suspend or revoke any permit issued to the violator. 42 U.S.C. § 6928 (c).

alleged violations occurred, he admitted some of the violations and denied others.

Administrative Law Judge ("ALJ") Marvin Jones was assigned this case. On September 20, 1983, EPA filed a "Motion for Leave to Withdraw Administrative Complaint" without prejudice. ALJ Jones granted this motion pursuant to 40 C.F.R. § 22.14(e).

On February 2, 1984, EPA filed a new complaint, captioned "First Amended Complaint," alleging the same violations as the original compliant, assessing the same $25,000 civil penalty, and naming only the Corporation. Despite objecting that the "amended" complaint was a new complaint because the original complaint had been dismissed without prejudice, the Corporation answered the complaint and, again, raised the defense that it was not in existence when the violations occurred. ALJ Jones set the matter for an evidentiary hearing pursuant to 42 U.S.C. § 6928 (b).[3]

The hearing lasted from October 23 to 25, 1984. After the EPA presented its case, the Corporation moved for a directed verdict, against asserting that it was not in existence on the date of the alleged violations. The ALJ denied the motion. Afterward, the Corporation put on its case consisting primarily of Shillman's testimony on the nature and the extent of the violations occurring in the December 1980 and the relationship

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[3]. 42 U.S.C. § 6928 states, in pertinent part"

> Any order issued under this section shall become final unless, no later than thirty days after the order is served, the person or persons named therein request a public hearing. Upon such request the Administrator shall promptly conduct a public hearing.

between the Partnership, the Corporation, and the individuals involved with each.

In April of 1985, over five months after the hearing, the EPA filed a motion to amend its complaint in order to add the Partnership and Shillman – Brueggemeyer was not named. The ALJ did not rule on this motion. Instead, on May 15, 1985, ALJ Jones issued his initial decision, finding the Corporation, the Partnership, and Shillman liable for the violations and imposed the $25,000 civil penalty. All three respondents appealed this decision, and the matter was referred to the Chief Judicial Officers (the "CJO") of the EPA.

On May 9,1976, the CJO vacated the ALJ's decision on the ground that the Partnership and Shillman were prejudiced by being denied fair notice of their potential liability for the penalty assessed against the Corporation and by being denied an opportunity to contest their liability. The CJO, however, remanded the order and with instructions that the EPA be permitted to amend its complaint to name the Partnership and Shillman and that each should have a hearing to present evidence before being subject to liability for the civil penalty.

In June 1986, EPA filed a "motion for Reconsideration", which was denied by the CJO. On December 17, 1986, the ALJ issued an order instructing the EPA to notify him of how it wished to proceed, given the CJO's opinion. The EPA did not respond. Subsequently, the ALJ dismissed the case with prejudice on the ground that the EPA was in default for failing to comply with his December 17th order. In September of 1987, EPA sought relief from the dismissal. On October 16, 1987, the ALJ issued an order granting the EPA's motion for relief from default and permitting it to a file a second amended complaint.

In November of 1987, EPA filed a "Second Amended Complaint" naming the Corporation, the Partnership, Shillman, Brueggemeyer and Vasi. All except Vasi[4] filed answers denying the allegations. Once again, the Corporation asserted the defense that it did not exist on the date the violations occurred. The others asserted that the statute of limitation had expired and therefore the claims were time-barred according to the five year statute of limitations set out in 28 U.S.C. § 2462.[5]

On April 13, 1988, the EPA moved for an accelerated decision, pursuant to 40 C.F.R. § 22.20[6], against each of the respondents on the ground that the testimony and evidence adduced at the October 1984 hearing established that all of those named in the second Amended complaint were liable for the December 1980 violations.

On September 30, 1988, the ALJ granted the EPA's motion for an accelerated decision. Relying on the testimony from the hearing held in October 1984 and the answers to the second amended complaint, the ALJ found Shillman, Brueggemeyer and Vasi and the Partnership jointly and severally liable for the $25,000 civil penalty. He detailed that Shillman was liable as the "operator" of the Facility, and Brueggemeyer and Vasi were liable as the Facility's "owners". He did not find the

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[4]. Because Vasi never answered the second amended complaint, the ALJ found him to be in default and determined that the admitted all of the allegations against him. Vasi did not appeal the decision. He is now deceased.

[5]. § 2462 provides that no action shall be entered "unless commenced within five years from the date when the claim first accrued." 28 U.S.C. § 2462

[6]. 40 C.F.R. § 22.20 provides that the ALJ may issue an accelerted decision without conducting a hearing if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.

Corporation liable. He also rejected the statute of limitations defense as not applying to the government and not applying to the type of civil penalty assessed (remedial in nature rather than a sanction).

On October 24, 1988, the Partnership, Shillman and Brueggemeyer appealed to the CJO. On August 7, 1990, the CJO issued a decision affirming the ALJ's granting of an accelerated decision in favor of the EPA. He also found that the second amended complaint was filed timely under the "relation back" doctrine of the Federal Rules of Civil Procedure 15(c).

On September 4, 1990, the Partnership, Shillman, and Brueggemeyer appealed to the United States Court of Appeals for the Sixth Circuit, pursuant to the provisions of the Administrative Procedure Act 5 U.S.C. § § 704, 706. On December 13, 1990, the case was transferred to this Court, pursuant to 28 U.S.C. § 1631.[7] The Court affirmed the CJO's ruling on the statute of limitations issue, but remanded the case on the ground that the Partnership, Shillman, and Brueggemeyer were entitled to a public hearing, and ordered the ALJ to

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[7]. Section 1631 provides:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition of review of administrative action, is noticed for or filed with such a court and that court shall, if it is in the interest of justice, transfer such action or appeal to any court in which the action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it is was actually filed in or noticed for the court from which it is transferred.

conduct an evidentiary hearing allowing them the opportunity to present evidence to contest their liability for the penalty. See 42 .S.C. § 6928(b).

On remand, the case was heard by ALJ Gerald Harwood. In September of 1993, ALJ Harwood informed the parties that he would accept as evidence testimony from the 1984 hearing. In October of 1994, he held the evidentiary hearing. The EPA did not present new witnesses, but made its witnesses who testified in 1984 available for cross examination. During the hearing, the petitioners, for the first time, objection to the EPA's reliance upon the testimony from the 1984 hearing. They argued that EPA could not establish a *prima facie* case merely relying on prior testimony and not examining live witnesses. Despite ALJ Harwood's offer to permit Petitioners to cross-examine the witnesses, the petitioners declined to do so, and refused to present any defense. The ALJ reviewed the 1984 transcript *de novo*.

In July of 1995, ALJ Harwood issued his decision, finding the Partnership, Shillman, and Brueggemeyer jointly and severally liable for the violations and assessing a civil penalty of $23,500 against them.[8] He concluded that incorporating the testimony from the 1984 hearing into the record did not deprive the petitioners of their due process right because the petitioners were provided the opportunity to cross-examine witnesses and present evidence in their defense, even though they declined to do so. Petitioners appealed to the Environmental Appeals Board ("EAB"), the successor to the CJO.

On April 14, 1997, the EAB issued a decision rejecting the petitioners' argument that the complaint was time-barred, deferring to

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[8]. The initial penalty of $25,000 was reduced by $1500 by Judge Harwood.

this Court's prior ruling as binding precedent. The EAB found that Judge Harwood correctly followed the Court's ruling rejecting the statute of limitations defense and, thus, affirmed Judge Harwood's refusal to dismiss. The EAB also found no due process violations after considering the numerous opportunities the petitioners had to present their case and their wide latitude accorded the ALJ in structuring hearings. The EAB described the evidence from the hearings held in 1984 as "probative, relevant, and reliable, and thus properly admitted against Respondents." (EAB Decision, at 31.)

On May 14, 1997, Petitioners filed a complaint seeking judicial review of the final decision of the EPA imposing liability and assessing a $23,500 fine. On October 20, 1997, the EPA filed an amended answer and counterclaim seeking a judgment of $23,500 plus accrued interest, penalties, and costs since June 17, 1997 against J.V. Peters and Company, Shillman and Brueggemeyer, jointly and severally. On February 3, 1998, the EPA moved for summary judgment on the complaint and its counterclaim. On April 1, 1998 filed a cross motion for summary judgment.

III. STANDARD OF REVIEW

A. Motion for Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

The party moving for summary judgment bears the initial burden of production under Rule 56. The burden may be satisfied by presenting affirmative evidence that negates an element of the non-movant's claim or by demonstrating "an absence of evidence to support the non-moving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

If the movant meets this burden, the non-movant must "set forth the specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The substantive law identified which specific facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To avoid summary judgment, the non-movant must "make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

"The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 256 (citing Adickes v. Kress & Co., 398 U.S. 144, 158-59 (1970)). However, the non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585 (1986). "[T]he mere existence of some alleged factual disputes between the parties will not defeat an otherwise properly supported motion" for summary judgment. Anderson, 477 U.S. at 247-48.

B. Judicial Review of a Final Administrative Decision

Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706, provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of agency action. The reviewing court shall -

. . . (2) hold unlawful and set aside agency action, findings and conclusions bound to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of any agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706.

IV. STATUTE OF LIMITATIONS

A. Law

The applicable statute of limitations, 28 U.S.C. §2462, imposes a five year time limitation on the commencement of any action to recover civil penalties. Any action may, however, survive the statute of limitations restriction if it "relates back" to a complaint filed within the proper time period.

The doctrine of relation back, found in Federal Rules of Civil Procedure 15 (c), allows amendments to pleadings if they "relate back" to the original pleading. An amendment "relates back" to the date of the original pleading when:

1) relation back is permitted by law that provides the statute of limitations applicable to the action, or
2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provisions (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Fed. R. Civ. P. 15(c) (West. 1998).[9]

The language of 15(c) requires that four factors be present in order for an amendment to relate back:

(1) the basic claim must have arise out of the conduct set forth in the original pleading;

(2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense;

(3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and

(4) the second and third requirements must have been fulfilled within the prescribed limitations period.

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[9]. In 1991 Fed. R. Civ. P. 15 (c) (3) was amended to expand the time frame required for notice of the lawsuit to be given to defendants by providing that relation back was to be allowed where notice was received within 120 days after the expiration of the limitations period. This added the time allowed for service of the complaint under Rule 4(m) to the time period established by Schiavone. This change however, is not applicable in this case. The same standard for relation back that governed the Court's 1991 decision is relevant here.

Schiavone v. Fortune. 477 U.S. 21, 29 (1986).

A "mistake" under 15(c)(3) refers to an error concerning the proper identification of a party, and relation back is only permitted to correct a misnomer of a defendant where the proper defendant is already before the court. Worthington v. Wilson, 8 F.3d 1253, 1256 (1993). A mere lack of information on the identity of a party, such as naming a John Doe defendant and seeking to add the correct party after the statute of limitations has expired, is not sufficient to constitute a mistake. Id; see also Cos v. Treadway, 75 F.3d 230, 240 (1967). A mistake must be an error in naming the correct party. The effect of correcting such a mistake is merely to change the name under which a defendant is sued. Worthington v. Wilson, 8 F.3d at 1256.

B. ANALYSIS

The first issue before this Court is whether the CJO's decision that the second amended complaint was not time-barred is correct. petitioner argues that the CJO's decision was incorrect because the complaint was filed outside of the five-year statute of limitations and did not relate back to the previously filed action. Respondent counters that the CJO correctly determined that the second amended complaint related back, and, thus, was timely filed. In 1991, the Court reviewed this issue and affirmed the decision of the CJO.

After a thorough review of this case, the Court finds, as it did in 1991, that the CJO's determination that the second amended complaint related back was correct.

The CJO applied Rule 15(c) to resolve the statute of limitations questions by determining whether the doctrine of relation back was

applicable. In 1991, in accordance with section 19(e) of the A.P.A., 5 U.S.C. § 706, which requires the reviewing court to set aside any action taken that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," the Court considered whether the CJO's rejection of petitioners' time-bar argument was neither arbitrary and capricious, nor an abuse of discretion or violation of a constitutional right held by Petitioners and found that it was not.

The Court reiterates that the CJO had wide latitude such decisions, and properly concluded that the application of Rule 15 was proper. Furthermore, the CJO applied Rule 15 in a reasonable manner that was consistent with notions of fundamental fairness. As the Court stated in its Memorandum of Opinion issued in 1991,

> Rule 15(c) is an essential rule of federal practice; its proper application is consistent with fundamental concepts of fairness and notice. Moreover, the rule was applied in a reasonably fair manner by the CJO in this case; it is not disputed that the claim arose out of the conduct set forth in the first amended complaint; the additional parties, Shillman Brueggemeyer, and the partnership, had sufficient notice of the USEPA action before April 1985 that they could properly maintain a defense; and they should have been aware by April 1985 that, notwithstanding the fact that the USEPA brought its action against the corporation, that they could be potentially liable for the violations.

J.V. Peters and Co., Inc. v. William K. Reilley, Adm'r U.S. Environmental Protection Agency No. 1:90CV2246, slip op. at 12 (N.D. Ohio Aug. 13, 1991).

Although Rule 15(c)(3) was amended in 1991, the parties agree that the portion of the rule applicable to this case was not altered by the amendment.[10] The parities also agree that first two criteria of 15(C)(3) have been met: (1) the claims against the petitioners arose out of the same conduct and that (2) the petitioners received notice within the statute of limitations. (Petitioners' Cross-Motion for Summary Judgment at 20.) They disagree however, as to whether "the Petitioners knew, or should have known that, but for a mistake in identity of the proper party, EPA would have named them as respondents within the limitations period." (Id.)

The Sixth Circuit has stated that the failure to name a proper party to a lawsuit must result form a mistake in name only, and fixed by "correct[ing] of misnomers . . . but not the addition or substitution of new parties after the statute of limitations has expired." In Re Kent Holland, 928 F.2d 1448, 1450 (6th Cir. 1991), citing Ringrose v. Engelberg Huller, 692 F.2d 402, 405 (6th Cir. 1982).

The CJO found that the Petitioners knew or should have known that but for a mistake in naming the parities, the EPA would have named them as the parties responsible for the violations. The record supports that conclusion. The EPA intended to bring a lawsuit against those responsible for the violations at the Facility. When the original

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[10]. Prior to December 1991, subsection (3) of Rule 15(c) did not contain the language "within the period provided by rule (m) for the service of the summons and complaint." Instead the rule said "within the limitations period." The 1991 Amendment enlarged the relevant time period by providing that relation back was to be allowed where notice was received within 120 days after the expiration of the limitations period, thereby, adding the time allowed for service for the complaint under Rule 4(m) to the time period established by Schiavone v. Fortune, 477 U.S. 21 (1986). E.g., Lovelace v. O'Hara, 985 F.2d 847, 850 (6th Cir. 1993).

complaint was filed in April of 1981, the Corporation was the owner and operator of the Facility, Shillman was the president and chairman of the board, and Brueggemeyer was the secretary and treasurer. Shillman answered the evidentiary hearing held in 1984, it was established that the Partnership had transferred all of its assets and liabilities to the Corporation. In April 1985, the EPA filed a motion to amend in order to include Shillman and the Partnership. Though the ALJ did not rule on this motion, the EPA had made the effort to name the correct parties while still within the statute of limitations. When the EPA filed its "Second Amended Complaint," it did name the proper parties; the Partnership, Shillman, Brueggemeyer, and Vasi. Given the fact that the parties were so interrelated and that Shillman and Brueggemeyer were intricately involved in the case from its inception, the CJO correctly found that an "identity of interests" existed between the Corporation and the Partnership. This "identity of interests" was so close that, the CJO concluded, Petitioners should have known that but for a mistake by EPA, they would have named the correct party in the lawsuit. Schiavone v. Fortune, 477 U.S. at 28.

The parties were essentially one and the same. The Court does not find credible Petitioners argument that there was not way they could have known of EPA's true intention to sue the Partnership until the "Second Amended Complaint" had been filed in late 1987. Given that there was such a close commonality of interest and identity, but for the EPA's misdesignation in name only, the Partnership, Shillman, and Brueggemeyer knew or should have known that they were involved in the lawsuit. Thus, the Court affirms the rulings of the CJO finding that the doctrine of relation back applies and that the second amended complaint was filed timely.

V. DUE PROCESS VIOLATIONS

A. Law

According to 40 C.F.R. § 22.24, "the complainant has the burden of . . . proving that the violation occurred . . . and that the proposed civil penalty . . . is appropriate. Following the establishment of a prima facie case, respondents shall have the burden of presenting and of going forward with any defense." 40 C.F.R. §22.24. Thus EPA had the burden of establishing a *prima facie* case before Petitioners were obligated to present any defense.

The fundamentals of due process require only that Petitioners be given the opportunity to be heard in a "meaningful time and in a meaningful manner." Matthews v. Eldrige, 424 U.S. 319, 333 (1976), citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965). However, a presiding officer possesses "wide discretion to control the order and format of administrative hearings." EAB Decision at 26. The Agency's Consolidated Rules of Practice ("the Rules") gives a presiding officer the authority to "do all . . . acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules." 40 C.F.R. § 22.04 (c) (10).

Additionally, the Rules clearly allow for the use of written statements in lieu of live testimony. See 40 C.F.R. § § 22.22 (c) & (d).[11]

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[11]. § 22.22 (c) states, in relevant part: "The Presiding Officer may admit an insert into the record as evidence, in lieu of oral testimony, statements of fact or opinion prepared by a witness." 40 C.F.R. § 22.22 (c).

§ 22.22 (d) states, in relevant part: "The Presiding Officer may admit into evidence

(See also EAB Decision at 26.) However, even when the rules do not specifically provide for nonoral testimony, the presiding officer has explicitly authority to allow it. Section 22.22 (b) states that witnesses shall be examined orally, "*except as otherwise provided* in these rules of practice or *by the Presiding Officer*." 40 C.F.R. § 22.22 (b) (emphasis in the original).

Courts have found that declarations and exhibits may be accepted in lieu of live testimony consistent with the due process as long as "the parties [a]re afforded 'amply opportunity to submit their evidence.'" See In Re Adair, 965 F.2d 777, 779 (1992) (upholding bankruptcy court's standard procedure requiring written direct testimony and oral cross and redirect examinations as not violative of due process). Fed. R. Evid. 611 (a) permits courts to exercise "reasonable control over the mode and order of interrogating witnesses and presenting evidence" to ensure that: 1) truth is ascertained; and 2) needless consumption of time is avoided. Fed.R.Evid. 611.

Additionally, Fed. R. Civ. P. 43 (a)[12] "ensures that the accuracy of witness statements may be tested by cross-examination and . . . allow[s] the trier of fact to observe the appearance and demeanor of the witnesses." See In Re Adair, 965 F.2d at 779; see also Saverson v. Levitt. 162 F.R.D. 407 (1995) (admitting direct testimony by way of

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affidavits of witnesses who are unavailable. The term 'unavailable' shall have the meaning accorded to it by Rule 804(a) of the Federal Rules of Evidence." 40 C.F.R. § 22.22 (d).

[12]. . Rule 43 (a) states: [i]n all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court."

declaration or written affidavit in lieu of the usual method of direct examination, as long as a full cross-examination was permitted).

B. ANALYSIS

Petitioners claim that ALJ Harwood erred in allowing EPA to establish its *prima facie* case against them in 1994 by relying on testimony from the 1984 hearing and making witnesses available for cross-examination.

In September of 1993, thirteen months before the hearing took place, ALJ Harwood notified the parties that 1984 testimony would be accepted. Petitioners expressed no objections until the day the hearing commenced, at which point they argued that due process required EPA to present live witness testimony in order to establish its *prima facie* case. This argument lacks merit.

An ALJ, like any presiding officer, has wide latitude in structuring the hearing as long as both sides are given the opportunity to present evidence on their behalf. ALJ Harwood's procedures were consistent with due process. In fact, he conducted the 1994 hearing in accordance with the Court's 1991 Opinion requiring that the petitioners be given the "opportunity to present evidence" in defense of the penalty assessed against them. J.V. Peters v. Reilly, No. 1:90 CV 2245 (N.D. Ohio Aug. 13, 1991) (Order). He allowed the EPA to submit the 1984 testimony in lieu of live witness testimony; however, he required that witnesses be made available for cross-examination. Petitioners had the opportunity to cross-examine each witness as well as present their own evidence, but chose to do neither. They cannot now claim a violation of due process.

Petitioners contend they were denied the opportunity to object to the 1984 evidence, but did not specify to what they would have objected if they had been given the chance. They also contend the ALJ was not able to assess the credibility of witnesses. The ALJ noted in his decision that had Petitioners conducted cross-examination of witnesses, he would have had that opportunity.

Petitioners further contend that the evidence against them was inadmissable hearsay because they were not parties to the lawsuit at the time of the 1984 hearing. The EAB Decision correctly stated that the "controlling inquiry in determining whether particular evidence is admissible is whether the evidence is relevant, probative and reliable." EAB Decision at 30. See also 40 C.F.R. § 22.22 (a).[13] The court is not persuaded by these arguments.

The EAB Decision correctly found that the acceptance of written testimony with the opportunity for live cross-examination comports with the requirements of due process and are within the discretion of the presiding officer. The Court finds the EAB correctly concluded that the Presiding Officer had afforded Petitioners "all that was required by due process," and Petitioners' failed to take advantage of these opportunities simply did not rise to the level of a due process violation." EAB Decision at 20.

Because the Presiding Officer has wide discretion in deciding what evidence is admissible, the EAB Decision correctly found that his decisions are accorded "substantial deference." EAB Decision at 30.

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[13]. . 40 C.F.R. § 22.22 (a) states, in pertinent part: "The Presiding Officer shall admit all evidence which is not relevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value."

The Presiding Officer's decision to admit the 1984 testimony because it was relevant, reliable, and probative was not an abuse of discretion.

VI. CONCLUSION

For the foregoing reasons, Respondent's Motion for Summary Judgment is granted as to the complaint and counterclaim and Petitioners' Motion for Summary Judgment is denied. Accordingly, a judgment for $23,500.00 plus interest accrued since June 17, 1997, penalties, and costs is hereby entered against Petitioners, David B. Shillman, Dorothy L. Brueggemeyer, and J. V. Peters & Company, jointly and severally.

IT IS SO ORDERED.

/s/ JUDGE JOHN MANOS
UNITED STATES DISTRICT JUDGE

(2) Supreme Court, U.S.
FILED

00-514 SEP 27 2000

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

J.V. PETERS & COMPANY, an Ohio Partnership, and
DAVID B. SHILLMAN
Petitioners,

vs.

UNITED STATES OF AMERICA,
CAROL BROWNER, Administrator of the
U.S. ENVIRONMENTAL PROTECTION AGENCY, and the
U.S. ENVIRONMENTAL PROTECTION AGENCY
Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

United States Court of Appeals for the Sixth Circuit

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Before the United State Environment Protection Agency
Environmental Appeals Board

IN RE: J.V. PETERS AND COMPANY, A PARTNERSHIP,
DAVID B. SHILLMAN, AND
DOROTHY L. BRUEGGEMEYER

Resource Conservation and Recovery Act

Docket No. V-W-81-R-75
RCRA (3008) Appeal No. 95-2
April 14, 1997

FINAL DECISION AND ORDER

Syllabus

J.V. Peters and Company, a partnership, David B. Shillman, and Dorothy L. Brueggemeyer (collectively, "Respondents") have Appealed an initial decision by Administrative Law Judge Gerald Harwood (the "Presiding Officer") assessing a civil penalty against them jointly and severally in the amount of $23,500 for numerous violations of section 3004 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. s 6924. The violations were observed during inspections of Respondents' Middlefield Township, Ohio hazardous waste storage and reclamation facility ("the facility") in December 1980. Respondents' present Appeal is the third in the Region's efforts to impose liability on Respondents for the numerous violations noted during the inspections of the facility seventeen years ago.

In 1981, the Region began administrative enforcement proceedings involving the facility by filing a complaint against J.V. Peters & Company, Inc., (the "Corporation"), a corporation which assumed all of the assets and liabilities of respondent J.V. Peters and Company ("the Partnership") shortly after the Region's 1980 inspections were completed. At an evidentiary hearing held in October 1984, the Region offered the testimony of two witnesses -- the EPA inspector and an environmental scientist -- to substantiate the violations alleged and the penalty proposed in its complaint against the Corporation.

The Corporation's defense rested entirely upon the testimony of its president, respondent Shillman. In testimony covering the Region's inspections of the facility, the formation of and relationship between the Partnership and the Corporation, and his role as manager of the facility, Mr. Shillman admitted that the facility was in violation of certain statutory requirements. Mr. Shillman also identified himself, the Partnership, and its partners as persons or entities who owned or controlled the facility at the time of the inspections, and in doing so provided evidence inculpating these persons and entities.

In May 1985, Administrative Law Judge Marvin Jones ("the ALJ") issued an initial decision, finding the Corporation, the Partnership and Mr. Shillman jointly and severally liable for the violations alleged in the complaint, and assessing against them a $25,000 penalty therefor. The Corporation Appealed the decision to the EPA's Chief Judicial Officer ("CJO"), who held that the ALJ had erred in finding the Partnership and Shillman liable, since they were not parties to the complaint. The CJO therefore remanded the case to allow the Region to amend its complaint and to allow Mr. Shillman and the Partnership to prepare and present their defenses.

In November 1987, the Region filed its Second Amended Complaint, naming the Respondents, the Corporation, and Mr. John Vasi, a partner in the Partnership. With the exception of Mr. Vasi, who defaulted, all of the respondents filed answers denying liability and raising as an affirmative defense the five-year statute of limitations contained in 28 U.S.C. s 2462. In September 1988, relying upon the record established at the 1984 hearing and Respondents' answers to the Second Amended Complaint, the ALJ issued a second initial decision, in which he rejected the statute of limitations defense and found Respondents and Mr. Vasi jointly and severally liable for the $25,000 penalty previously assessed. The ALJ found that the Corporation was not liable for any of the violations, since it did not exist at the time of those violations.

Respondents then Appealed to the CJO, who issued a final decision in August 1990 affirming the ALJ's September 1988 initial decision. The CJO held that the statute of limitations defense was without merit since the Second Amended Complaint related back to an earlier complaint which was timely filed. He also held that an accelerated decision was warranted because Respondents failed to show that they were entitled to a hearing, to demonstrate any disputed issues of material fact, or to show that the Region was not entitled to judgment as a matter of law.

Respondents then Appealed to the U.S. Court of Appeals for the Sixth Circuit, which transferred the case to the U.S. District Court for the Northern District of Ohio, Eastern Division. In an unpublished decision issued in August 1991, the District Court affirmed the CJO's decision on the statute of limitations issue, but found that the CJO had erred in affirming the ALJ's denial of a hearing to Respondents. Accordingly, the case was remanded for the second time, with specific

instructions from the District Court requiring that an evidentiary hearing be conducted "wherein * * * David B. Shillman, Dorothy L. Brueggemeyer, and J.V. Peters and Company are given an opportunity to present evidence to contest their liability for the $25,000 civil fine assessed against them * * *."

In September 1993, after the case had returned to the EPA, Presiding Officer Gerald Harwood issued a letter to the parties announcing that he would conduct the evidentiary hearing by permitting the Region to utilize the transcribed testimony of its witnesses from the 1984 hearing, in lieu of presenting those witnesses for oral direct testimony. The Presiding Officer stated that he would then require the Region to tender those witnesses to Respondents for cross- examination. Although Respondents had objected to this procedure when it was first proposed by the Region in its pre- hearing exchange, they did not object to the format as established by the Presiding Officer.

The evidentiary hearing, held in October 1994, began with a heated debate between counsel as to how the hearing should proceed. Respondents insisted that due process required that the Region present its case anew with live witness testimony. The Region protested that the hearing should proceed as established by the Presiding Officer. Ultimately, the Presiding Officer ordered the parties to follow the procedure established in his September 1993 letter. He granted Respondents the right to conduct "wide open" cross-examination and to offer whatever evidence they desired in their defense. He also assured Respondents that he would review the entire record from the 1984 hearing de novo.

At the hearing, the Region's inspector offered brief testimony reaffirming her 1984 testimony. Respondents refused to cross-examine her, claiming that the Region had not put on any evidence and Respondents therefore were not obligated to present any defense. Respondents also stated they would have no cross- examination for the Region's environmental scientist. When the Region then attempted to call Mr. Shillman for the sole purpose of reaffirming his 1984 testimony, Respondents refused to produce him, claiming that since the Region had offered no evidence they were not obligated to offer any defense, which included making their witnesses available to the Region. Having offered into evidence the transcript of the 1984 hearing, including the documents admitted as exhibits, the Region rested its case. Despite being given the opportunity to present a full-fledged defense, Respondents offered no witnesses or evidence in their behalf.

In July 1995, the Presiding Officer issued his initial decision finding the Partnership, Mr. Shillman and Ms. Brueggemeyer jointly and severally liable for the violations alleged. Making a minor reduction in the penalty to account for his dismissal of one of the violations, the Presiding Officer assessed a civil penalty of $23,500 against all Respondents. In his initial decision, the Presiding Officer rejected Respondents' claims that they had been denied due process in the 1994 hearing, noting that he had satisfied the District Court's remand order by giving them opportunities to cross-examine the Region's witnesses and to present evidence in their defense. The Presiding Officer let stand his earlier ruling rejecting Respondents' statute of limitations defense.

Respondents' present Appeal is taken from the July 1995 initial decision, and raises the following issues: (1) whether the complaint is barred by the five- year statute of limitations contained in 28 U.S.C. s

2462; (2) whether the Presiding Officer erred by permitting the Region at the 1994 hearing to establish its prima facie case utilizing evidence from the 1984 hearing; and (3) whether Respondents are liable for the penalty assessed against them.

Held: The District Court's ruling that the complaint is not barred by the statute of limitations is the law of the case, thus precluding further review of that issue by the Board.

The Presiding Officer did not err in permitting the Region to utilize evidence from the 1984 hearing to establish its prima facie case against Respondents at the 1994 hearing. The format of the hearing was consistent with the requirements of the District Court's remand order, and Respondents were not deprived of due process of law. The Presiding Officer has broad discretion to control the order and format of administrative hearings under the Consolidated Rules of Practice and those rules specifically permit the use of written statements in lieu of oral testimony. In addition, Respondents were given ample notice of the format which would be followed at the 1994 hearing, and had been provided well in advance of the hearing the transcript page citations of the testimony that the Region planned to introduce. Respondents were afforded the opportunity to conduct wide open" cross- examination of the Region's witnesses. Respondents' refusal to take advantage of these opportunities cannot be assigned as error on the part of the Presiding Officer.

Further, the witness testimony and other evidence from the 1984 hearing was properly introduced against Respondents at the 1994 hearing, as all such evidence was relevant, probative and reliable, which is the standard for admission of evidence under the Consolidated Rules.

None of Respondents' specific contentions as to why this evidence was inadmissible has any validity.

The findings of liability and the penalty assessed against Respondents are affirmed, since Respondents fail to address the substance of the findings of liability and the amount of the penalty in their Appeal.

Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich. [FN1]

Opinion of the Board by Judge Reich:

J.V. Peters and Company, a partnership, David B. Shillman, and Dorothy L. Brueggemeyer (hereafter referred to collectively as "Respondents") [FN2] have Appealed an initial decision issued on July 18, 1995, assessing against them jointly and severally a $23,500 penalty for numerous violations of section 3004 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. s 6924, which were observed during an inspection that took place in December 1980. The issues raised on Appeal are: (1) whether the complaint is barred by the five-year statute of limitations contained in 28 U.S.C. s 2462; (2) whether the presiding officer erred by permitting U.S. EPA Region V to establish its prima facie case against Respondents by utilizing evidence from a prior hearing; [FN3] and (3) whether Respondents are liable for the penalty assessed against them. For the reasons set forth below, we affirm the initial decision.

I. BACKGROUND

This is the third time this case has reached the level of an administrative Appeal. [FN4] A summary of the history of the case is required in order to understand fully the claims raised in this Appeal.

A. Initial Proceedings Against the Corporation (1980-1984)

In May 1980 respondent David B. Shillman leased property located at 17030 Peters Road in Middlefield Township, Ohio for the purpose of operating a hazardous waste storage and reclamation facility. The facility began operations one month later in June 1980, under the name "J.V. Peters and Company," (the " Partnership"), a partnership whose partners were Dorothy Brueggemeyer (Mr. Shillman's wife), and John Vasi, an acquaintance of Mr. Shillman's. Mr. Shillman was the manager of the facility and maintained complete control over its operations. See 1984 Hearing Transcript ("1984 Tr.") at 432.

In December 1980, Melinda Becker, an employee of the Ohio Environmental Protection Agency, inspected the Partnership's hazardous waste facility in Middlefield Township [FN5]. Ms. Becker identified eighteen alleged violations of RCRA and its implementing regulations. [FN6] Soon thereafter, she sent a copy of her inspection report to the Partnership. On January 30, 1981, two weeks after receiving the inspection report, J.V. Peters and Company, Inc., an Ohio corporation (the "Corporation") was formed and the Partnership transferred all of its assets and liabilities to the Corporation. Mr. Shillman served as the Corporation's president and chairman of the board of directors. Ms. Brueggemeyer, one of the Corporation's stockholders, was the secretary and treasurer of the Corporation, and

one of its directors. The business of the Corporation was identical to that of the Partnership. [FN7]

On April 17, 1981, U.S. EPA Region V ("the Region") filed a complaint based upon the December 1980 inspections, naming only the Corporation as a respondent. On February 7, 1984, the Region filed an amended complaint, again naming only the Corporation as a respondent.

B. 1984 Evidentiary Hearing

In October 1984, a three-day hearing on the complaint was held before Administrative Law Judge Marvin Jones. [FN8] Three witnesses appeared and testified: Ms. Becker, the inspector; Dr. Homer, an environmental scientist employed in the Region's Waste Management Division; and Mr. Shillman, president of the Corporation and manager of its hazardous waste storage facility.

Ms. Becker's testimony focused on the violations alleged in the complaint. She testified at length about the site conditions she observed and conversations she had with Mr. Shillman during the inspection. She also testified about some of her previous and subsequent inspections of the site. Counsel for the Corporation vigorously cross-examined Ms. Becker, covering topics such as the motive for the inspection, whether the alleged violations actually occurred, and whether the Corporation promptly remedied or attempted to remedy the alleged violations. This cross-examination (and re-cross-examination) consumed 174 pages of the hearing transcript.

Dr. Homer, the Region's next and last witness, gave testimony to establish the appropriate penalty amount for the alleged violations.

He testified that he had participated in drafting the 1984 amended complaint and in calculating the $25,000 penalty proposed therein. His testimony explained how he calculated a penalty amount for each of the alleged violations based upon Ms. Becker's inspection report and the applicable penalty policy. [FN9] Dr. Homer was also vigorously cross-examined by counsel for the Corporation.

At the conclusion of Dr. Homer's testimony, the Corporation moved to dismiss the complaint on the ground that the Corporation did not exist on December 17, 1980, the date of the alleged violations. The motion was denied. [FN10] The Corporation then put on its sole witness, Mr. Shillman. Mr. Shillman testified at length about the December 1980 inspections and his numerous contacts with both the State and federal environmental agencies. His testimony also covered the steps the Corporation took to comply with the Interim Status Standards, the financial status of the Corporation at the time of the hearing, and the formation of and relationship between the Partnership and the Corporation.

On the latter topic, Mr. Shillman explained that he had organized the Partnership in 1980 to enter the industrial waste handling business. The Partnership was comprised of two partners: John Vasi and Mr. Shillman's wife, Dorothy L. Brueggemeyer. The Partnership's operations were funded by a single $25,000 contribution from Ms. Brueggemeyer, which was the sole capital investment in the business. According to Mr. Shillman, the Partnership transferred all of its assets and liabilities to the Corporation, which was created on January 30, 1981. Mr. Shillman affirmed that the business of the Corporation was the same as the business of the Partnership.

Mr. Shillman admitted that the facility was in violation of certain statutory requirements. He also identified himself, the Partnership and its partners as the persons or entities who owned and controlled the facility at the time of the inspection, and thus provided evidence inculpating these persons and entities. 1984 Tr. at 432-433, 436, 482, 497, 549-551, 588-590.

After the hearing concluded but before ALJ Jones issued a decision, the Region moved to amend its complaint to name Mr. Shillman and the Partnership as respondents. ALJ Jones did not rule on this motion. Instead, in May 1985, he issued his initial decision, finding the Corporation, the Partnership and Mr. Shillman jointly and severally liable for the violations alleged in the complaint and assessing a $25,000 civil penalty therefor.

The Corporation Appealed the initial decision and it was vacated by the Agency's Chief Judicial Officer ("CJO"). The CJO concluded that because the Partnership and Mr. Shillman had not been named as respondents, ALJ Jones had erred in finding them liable. According to the CJO, the Partnership and Mr. Shillman should have been given "an opportunity to present evidence at the hearing to contest responsibility for the violations." In re J.V. Peters & Company, Inc., 2 E.A.D. 177, 183 (CJO 1986). Therefore, the CJO remanded the case to allow the Region to amend its complaint, and to allow Mr. Shillman and the Partnership to prepare and present their defenses.

C. Proceedings After Remand by CJO (1987- 1991)

The Region filed its Second Amended Complaint in November 1987, naming as respondents the Corporation, the Partnership, Mr. Shillman, Ms. Brueggemeyer and Mr. Vasi. With the exception of Mr.

Vasi [FN11] all Respondents filed answers denying the alleged violations and raising as an affirmative defense the five-year statute of limitations in 28 U.S.C. s 2462. [FN12]

The Region moved for an accelerated decision on the Second Amended Complaint pursuant to 40 C.F.R. s 22.20, which provides that a presiding officer may render a decision without a hearing if there are no issues of material fact and the moving party is entitled to judgment as a matter of law. In support of its motion the Region relied upon the testimony and documentary evidence produced at the 1984 hearing, and upon Respondents' answers to the Second Amended Complaint.

In September 1988, ALJ Jones granted the Region's motion for an accelerated decision. He concluded that the remand order did not disturb his previous findings that violations warranting a $25,000 penalty had occurred, and thus he was only required to decide who was responsible for that penalty. Relying upon the record established at the 1984 hearing and Respondents' answers to the Second Amended Complaint, ALJ Jones found Mr. Shillman liable as the "operator" of the facility, and partners Ms. Brueggemeyer and Mr. Vasi liable as "owners" of the facility, and he therefore assessed the $25,000 penalty jointly and severally against Mr. Shillman, Mr. Vasi, Ms. Brueggemeyer and the Partnership. [FN13] He rejected Respondents' statute of limitations defense.

For the second time, Respondents Appealed to the Agency's CJO, who this time affirmed ALJ Jones' initial decision. [FN14] See In re J.V. Peters & Company, Inc., 3 E.A.D. 280 (CJO 1990). The CJO concluded that the statute of limitations defense was without merit. Assuming for purposes of discussion that the statute applied (a point contested by the Agency), he concluded that the action would not be

barred in any event because the Second Amended Complaint related back to the previous complaint, which was filed within the limitations period. Id. at 285-290. The CJO also concluded that an accelerated decision was warranted because Respondents failed to show that they were entitled to a hearing (even though the rules governing the accelerated decision process gave them the opportunity to do so), and because they failed to demonstrate any disputed issues of material fact or show that the Region was not entitled to judgment as a matter of law. Id. at 291-296.

Respondents then Appealed to the United States Court of Appeals for the Sixth Circuit, which transferred the case to the United States District Court for the Northern District of Ohio, Eastern Division ("District Court"). In an unpublished decision issued on August 13, 1991, the District Court upheld the CJO's decision on the statute of limitations issue, adopting the CJO's rationale that the statute did not bar the claims made in the Second Amended Complaint because those claims related back to the previous complaint, which was timely filed. See J.V. Peters v. Reilly, No. 1:90 CV 2246, slip op. at 12-13 (N.D. Ohio Aug. 13, 1991). However, the District Court found that the CJO had erred in affirming ALJ Jones' denial of a hearing to Respondents. Id. at 13. Relying on the specific wording of the RCRA statute upon which the Region's allegations were based, the District Court held that Respondents were entitled to a public hearing as a matter of law. Id. at 14- 15. [FN15] Accordingly, the case was remanded for the second time, this time with instructions from the District Court to:

> [C]onduct an evidentiary hearing wherein * * * David B. Shillman, Dorothy L. Brueggemeyer, and J.V. Peters and Company [the Partnership] are given an opportunity to present evidence to contest their

liability for the $25,000 civil fine assessed against them in the United States Environmental Protection Agency's Second Amended Complaint.

J.V. Peters v. Reilly, No. 1:90 CV 2246 (N.D. Ohio Aug. 13, 1991) (Order) (hereafter "Remand Order") (emphasis added).

D. Proceedings Following Remand by District Court (1992-1994)

Shortly after the case returned to the Agency, the parties submitted pre- hearing exchanges to a newly assigned presiding officer, Senior Administrative Law Judge Gerald Harwood (the "Presiding Officer"). In its pre-hearing exchange, the Region stated that it intended to rely on the record from the 1984 hearing and to produce additional evidence only to the extent necessary to put on a rebuttal case.

Respondents filed separate but virtually identical submissions, asserting that: (1) they were not liable for any civil penalty since they were not parties in the prior action and had not been given an opportunity to defend themselves against the charges; (2) they did not commit any of the alleged violations; (3) even if they had, the penalty was unwarranted; and (4) the complaint was barred by the statute of limitations and should therefore be dismissed. [FN16] Each Respondent stated its intent to present evidence only after the Region first presented a prima facie case establishing the liability of that Respondent. Respondents uniformly objected to the Region's plan to rely on the record from the 1984 hearing, claiming they had no opportunity to cross- examine witnesses or challenge documents at that time.

Having noted that objection, Respondents indicated they would proceed at the hearing by cross- examining Ms. Becker and then calling

Mr. Shillman, Ms. Brueggemeyer, and Mr. Angelo Colon (a vice-president of the Corporation), as witnesses in their behalf. Many of the documents Respondents indicated they would introduce at the hearing were the same ones that had been introduced and relied upon by the Corporation in 1984.

Based upon these submissions, the Presiding Officer scheduled a four-day hearing for November 1993 in Cleveland, Ohio. In correspondence to the parties informing them of the hearing date, the Presiding Officer established the format to be followed at that hearing:

> The EPA in lieu of presenting its witnesses for oral direct testimony may offer, instead, their transcribed direct testimony from the previous hearing. The witnesses shall be made available, however, for cross examination. * * *.
>
> Mr. English will review the testimony of the EPA's witnesses from the prior hearing and notify the EPA attorney prior to the hearing which of theEPA's witnesses he intends to cross examine at the hearing.
>
> Letter from Gerald Harwood, Senior Administrative Law Judge, to Brent L. English, Counsel for Respondents, and Thomas J. Krueger, Counsel for Region V (Sept. 9, 1993) ("Harwood letter").

On September 16, 1993, the Region filed a supplemental pre-hearing exchange which, among other things, reaffirmed its intent to rely upon the evidence produced at the 1984 hearing, and in particular,

the testimony of Ms. Becker and Mr. Shillman. [FN17] Respondents filed no supplemental pre-hearing exchange and did not express any objections to the hearing format established in the Harwood letter.

The four-day hearing originally scheduled for November 1993 was postponed and rescheduled several times. On January 31, 1994, in preparation for the hearing then scheduled to go forward in February, the Region provided to Respondents and the Presiding Officer a list identifying the testimony and documents it intended to rely upon at the hearing, along with page citations corresponding to the 1984 transcript. Letter from Thomas J. Krueger, Assistant Regional Counsel, to Gerald Harwood, Senior Administrative Law Judge (January 31, 1994) ("Krueger letter"). [FN18] Approximately one week before the actual hearing commenced, the Presiding Officer issued an order rejecting the statute of limitations defense raised in Respondents' answers to the complaint. [FN19]

E. 1994 Evidentiary Hearing

On October 3, 1994, the parties convened in Cleveland, Ohio for the four-day hearing. However, the hearing lasted only a single day, most of which was spent in arguments about how the hearing should proceed. Although the Presiding Officer had established the hearing format in September 1993 and Respondents had lodged no objections thereto in the ensuing thirteen months, [FN20] they now insisted that due process required the Region to present its case anew with live witness testimony on direct. Further, Respondents stated that until the Region did so, Respondents were not obligated, and indeed, did not intend, to present any defense. The Region protested that the hearing should proceed as established by the Presiding Officer in the Harwood letter, that is with the Region offering on direct the transcribed

testimony of its witnesses from the 1984 hearing, then tendering the witnesses for cross- examination by Respondents.

After listening to a good deal of argument between counsel, the Presiding Officer ruled that the procedure established in his September 1993 letter would be followed. He granted Respondents the right to conduct "wide open" cross- examination of the Region's witnesses (1994 Transcript ("1994 Tr.") at 4, 6), and assured Respondents that he would review the entire record from the 1984 hearing de novo (id. at 74).

The hearing then commenced. The Region called Ms. Becker to the witness stand. Under oath, she briefly reaffirmed the testimony she had given at the 1984 hearing. The Presiding Officer then invited Respondents to cross-examine Ms. Becker, having previously given them wide latitude as to the scope of their examination. Id. at 4, 6. Respondents, however, refused to cross-examine Ms. Becker on the ground that the Region had not presented any evidence, and therefore they were not obligated to present any defense. The Region then offered into evidence the written record of Ms. Becker's 1984 testimony. Id. at 23-24.

Dr. Homer was not scheduled to appear until the second day of the hearing. Consistent with its pre- hearing exchange and with the established hearing format, the Region explained that it intended to call Dr. Homer to the witness stand solely to reaffirm his 1984 testimony. In response, Respondents stated that if the Region proceeded in that fashion, they would not cross-examine Dr. Homer, contending as they had with Ms. Becker, that any such "reaffirmance" would not constitute "evidence" and that they therefore had no obligation to engage in cross-examination. Based on Respondents' statement that they did not intend

to cross-examine Dr. Homer, the Presiding Officer permitted the Region to cancel Dr. Homer's appearance. The Region then offered into evidence the written record of Dr. Homer's 1984 testimony. 1994 Tr. at 52.

Again following the trial strategy revealed in its pre-hearing exchanges, the Region intended to call Mr. Shillman as its final witness for the sole purpose of reaffirming his 1984 testimony. Although Respondents had stated in their pre-hearing submissions that they would call Mr. Shillman as a witness in their behalf, they refused to make him available to the Region, claiming, for the third time, that since the Region had not put on any evidence they were not obligated to present any defense, which included making any of their witnesses available to the Region. 1994 Tr. at 56. The Region then offered into evidence the written record of Mr. Shillman's 1984 testimony, and rested its case. 1994 Tr. at 59, 68.

Respondents made an oral motion to dismiss which the Presiding Officer initially denied but later agreed to take under advisement. Id. at 68, 73, 84. Respondents then rested their case stating through their counsel: " [R]espondents, in light of the facts, * * * believe the Government has not made out even a prima facie case, [and] are not prepared to offer any evidence." Id. at 82.

Throughout the hearing, the Presiding Officer reiterated that he would consider the entire record of the 1984 proceedings, (including the documents marked as exhibits), and that Respondents were free to contest the propriety of that decision, among other issues, in their post-hearing briefs. 1994 Tr. at 47, 64, 77.

F. Initial Decision following 1994 Hearing

In July 1995, after the parties had exchanged and filed their post-hearing briefs, the Presiding Officer issued his initial decision in which he found the Partnership, Mr. Shillman and Ms. Brueggemeyer jointly and severally liable for the violations alleged and assessed a civil penalty against all Respondents of $23,500. In re J.V. Peters and Company, Inc., Docket No. V-W-81-R-75 (ALJ, July 18, 1995) ("Initial Decision"). [FN21]

First, the Presiding Officer cogently summarized the core disputed issues:

> The question initially presented * * * is whether Respondents, having been given the opportunity to cross-examine Complainant's witnesses on their sworn testimony at the prior hearing and to present evidence on their own behalf, will be deprived of a fair hearing if the evidence adduced at that prior hearing is made part of the record of this hearing and relied upon to determine Respondents' liability for a penalty. If Respondents prevail on this issue, the complaint must be dismissed. If Respondents do not prevail, it must then be determined whether the reliable and probative evidence of record, giving consideration to the record as a whole, supports a finding that the violations have occurred and that Respondents are liable for the penalty of $25,000, proposed in the complaint or for some lesser penalty.

Initial Decision at 8-9.

Analyzing the due process issues as a whole, the Presiding Officer noted that Respondents had been given an opportunity to cross-examine the Region's witnesses and to present evidence in their defense, but had declined to do either. The Presiding Officer was therefore satisfied that Respondents had been afforded all that was required by due process and by the District Court's order. In the Presiding Officer's view, Respondents' failure to take advantage of these opportunities simply did not rise to the level of a due process violation: "Having declined to take advantage of any of these opportunities, [Respondents'] arguments as to asserted deficiencies in the 1984 record are unpersuasive." Initial Decision at 12.

The Presiding Officer then considered and responded separately to each of Respondents' due process contentions. He found Respondents' complaint that they had no opportunity to object to the evidence in the 1984 record unpersuasive because Respondents failed to specify either the objections they would have made or the grounds for making them. Id. He found Respondents' argument that they were "deprived" of the opportunity to have him assess the credibility of witnesses similarly unpersuasive, noting that he would have had sufficient opportunity to make such an assessment on cross-examination had Respondents conducted one. Id. at 12-13. He found Respondents' argument that the 1984 record was inadmissible hearsay also without merit, since hearsay rules do not apply in administrative proceedings, and the evidence was reliable and probative and thus admissible under 40 C.F.R. s 22.22(a). Id. at 13- 14. [FN22]

Having determined that the record from the 1984 proceedings was properly admitted and relied upon, the Presiding Officer then moved on to consider whether there was sufficient evidence to hold Respondents liable for the alleged violations. Considering the eighteen

violations alleged in the complaint, the Presiding Officer found that all but one had occurred. [FN23] Then, considering the specific liability of each Respondent, the Presiding Officer found that Mr. Shillman was individually liable based upon his role as the operator of the facility, the Partnership was liable as the owner of the facility on the date of the alleged violations, and Ms. Brueggemeyer was liable based on her status as a partner in the Partnership on the date of the alleged violations. Id. at 21-23.

Finally, the Presiding Officer evaluated the penalty and reduced it by $1500 to account for his dismissal of the closure procedure violation. [FN24] Accordingly, the Presiding Officer assessed a $23,500 penalty jointly and severally against the Partnership, Mr. Shillman and Ms. Brueggemeyer. Id. at 23-25.

Respondents Appealed the Initial Decision to this Board, necessitating our review of the issues previously outlined.

II. DISCUSSION

We begin with an analysis of Respondents' statute of limitations argument, because if they succeed on this issue, we need not consider their remaining arguments.

A. Statute of Limitations

Respondents' contention that the complaint is barred by the five-year statute of limitations set forth in 28 U.S.C. s 2462 (Resp. Br. at 1, 30-44) has been rejected by every judge who has considered the issue in these proceedings. [FN25] The most significant of these rejections is U.S. District Judge Manos' ruling that the complaint is not

time- barred. J.V. Peters v. Reilly, slip op. at 12-13. That ruling is the law of the case, and thus precludes further review of the issue by this Board.

The doctrine of law of the case prevents relitigation of settled rulings. See generally James W. Moore, Moore's Federal Practice pp 404[1] & 404[10](2d ed. 1991) ("Moore's Fed. Prac."). Under the doctrine, "a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation." Id. p 404[1]; Central Soya, Inc. v. Hormel & Co., 723 F.2d 1573, 1580 (Fed. Cir. 1983). [FN26] As a consequence, an inferior court has no power to deviate from a reviewing court's ruling on an issue of law; the ruling becomes mandatory precedent which the lower court is obligated to follow. Moore's Fed. Prac. p 404[10]; see also, Briggs v. Pennsylvania R.R. Co., 334 U.S. 304, 306 (1948) (stating general rule). The doctrine applies with equal force in administrative agency adjudications. [FN27]

Thus, the Presiding Officer correctly followed the ruling of the District Court in rejecting Respondents' statute of limitations defense. Consequently, we affirm his refusal to dismiss the complaint.

B. Evidence from 1984 Hearing

Respondents advance a three-pronged attack on the Presiding Officer's decision to permit the Region to utilize evidence from the 1984 hearing to establish its prima facie case at the hearing in 1994. Respondents contend that utilization of that evidence was inconsistent with the Remand Order, violated due process, and was improper because the evidence was inadmissible against them. Resp. Br. at 19-30.

1. Consistency with Remand Order

We first consider Respondents' argument that permitting the Region to establish its prima facie case utilizing evidence from the prior hearing was inconsistent with the Remand Order. In further explaining this point, Respondents contend, "it is reasonable to assume that * * * Judge Manos' finding that the CJO [erred] by affirming an accelerated decision on the basis of the 1984 record * * * require[d] a new hearing at which [Respondents] could hear the evidence * * * against them, and then exercise their "opportunity to present evidence in their own defense' * * *." Resp. Br. at 20.

While the text of the Remand Order (see Section I.C., supra) is ambiguous in this respect, we will assume for purposes of our analysis that Respondents are correct that the District Court's order requires a new hearing, not a continuation of the old one. Even under this assumption, however, we find no language in the Remand Order which prohibits the Presiding Officer from structuring the hearing as he did, that is, allowing the Region to establish its prima facie case anew utilizing evidence from the 1984 hearing. Further, contrary to Respondents' claims, the Presiding Officer did hold a new hearing, because he agreed to consider the evidence from the 1984 hearing de novo (1994 Tr. at 74), he gave Respondents the opportunity to cross-examine the Region's witnesses on topics not covered at the previous hearing (id. at 4, 6), and he also gave Respondents wide latitude to present new evidence in their defense (id. at 13). [FN28] Since Respondents were in fact granted a "new" hearing, we reject their contention that the structure or format of the 1994 hearing was inconsistent with the Remand Order.

2. Due Process

Respondents contend that permitting the Region to utilize evidence from the 1984 hearing against them in 1994 violated due process. Resp. Br. at 2, 20-30. Although they fail to fully explain this contention, [FN29] it is clear that Respondents' claims that they were denied due process lie at the heart of this Appeal. See id. Consequently, we address this contention separately, rather than as a component of Respondents' other two arguments attacking the use of evidence from the 1984 hearing.

Due process requires that a person be given adequate notice and an opportunity to be heard in any proceeding where he or she may be deprived of life, liberty or property. Mullane v. Central Hanover Bank, 339 U.S. 306, 313-314 (1950). See also Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty or property "be preceded by notice and an opportunity for hearing appropriate to the nature of the case."' [citing Mullane]) and Mathews v. Eldridge, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."'). [FN30] Applying these standards to the case under review, we find no violation of due process.

At the root of Respondents' vague claim that they were denied due process is an attack on the format of the hearing utilized by the Presiding Officer. See Resp. Br. at 21 (alleging that "the procedure sanctioned by ALJ Harwood * * * deprived [Respondents] of due process * * *."). However, we find no error in the Presiding Officer's decision to hold the hearing according to the format outlined in the Harwood letter. See discussion supra Section I.D.

Presiding officers have wide discretion to control the order and format of administrative hearings. See, e.g., In re Central Paint and Body Shop, Inc., 2 E.A.D. 309, 310 (CJO 1987) ("The Presiding Officer has broad authority to control the hearing * * *[citing 40 C.F.R. s 22.04(c)]") and In re Alaska Placer Miners, 3 E.A.D. 748, 752 (CJO 1991) ("The presiding officer has discretion to take appropriate actions to ensure the orderly administration of an evidentiary hearing."). In this vein, the Consolidated Rules of Practice ("Consolidated Rules") expressly provide:

> The Presiding Officer shall have authority to:
>
> Do all * * * acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules.

40 C.F.R. s 22.04(c)(10) (emphasis added).

With respect to witness testimony, the Consolidated Rulesplainly authorize the use of written statements in lieu of live testimony. See id. at ss 22.22(c) & (d). Further, the Presiding Officer has explicit authority to allow other than oral testimony even when the rules do not expressly provide for it. Specifically, Section 22.22(b) provides: "Witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in these rules of practice or by the Presiding Officer." (Emphasis added). In this respect, the Consolidated Rules allow procedures similar to those used in other administrative adjudications that have withstood due process challenges. See, e.g., Bennett v. National Transportation Safety Board, 66 F.3d 1130, 1137 (10th Cir. 1995) (use of affidavits without

opportunity for cross- examination did not violate due process in Federal Aviation Administration ("FAA") suspension hearing, where appellant was given notice of the procedure and failed to object or subpoena witnesses) and In re Adair, 965 F.2d 777 (9th Cir. 1992) (in bankruptcy proceeding direct testimony by way of written declarations did not violate due process where re-direct and cross- examination of declarant was permitted and the trier of fact was able to observe declarant's demeanor). Clearly, the practice of using written testimony to establish at least portions of a direct case is accepted in administrative proceedings and comports with due process. [FN31]

Here, Respondents had over one year's notice of the hearing and of the format which would be followed at that hearing. The Region's witnesses had both testified at the prior hearing in person, under oath and subject to extensive cross-examination. Respondents had the transcript of the prior proceeding, and in addition, transcript page citations provided by the Region which specifically identified the testimony the Region planned to introduce at the hearing in 1994. Finally, Respondents at the 1994 hearing had the opportunity to conduct "wide open" cross-examination of the Region's witnesses. 1994 Tr. at 4, 6.

Given these circumstances, we conclude that Respondents were afforded adequate notice and a fair opportunity to "be heard" before the civil penalty was imposed against them. This is all the "process" they were due, under either the literal terms of the Remand Order or under the more general concepts of notice and fairness embodied in Mathews v. Eldridge.

The result in Bennett, 66 F.3d at 1137, fortifies our conclusion. There, the FAA suspended Bennett's airline transport pilot certificate

after he engaged in flight maneuvers which caused a near collision with another aircraft. At the suspension hearing, the FAA introduced sworn statements from the couple in the other aircraft who had witnessed the flight maneuvers. Bennett Appealed the suspension on the grounds, inter alia, that he had been denied due process since he had been deprived of the opportunity to cross- examine the couple. In rejecting Bennett's due process claim, the Court of Appeals for the Tenth Circuit stated:

> But while Fifth Amendment protection extends to agency adjudications * * * that does not help Bennett. * * *. Bennett had been notified during the week preceding the Hearing that the O'Malleys would not be able to attend due to their vacation plans * * *, and that FAA would seek to have the O'Malleys' "testimony, at least in the form of a declaration" available at the hearing * * *. Nevertheless, Bennett failed to subpoena the O'Malleys, as was his right under Board's Rules of Practice * * *. Nor did he seek to depose the O'Malleys * * * or request a continuance either before the Hearing or afterwards. Thus having foregone the available opportunities for cross-examination, he cannot ascribe error on that ground.

Bennett at 1137 (citations omitted).

Bennett makes it plain that Respondents have stated no cognizable due process claims in this case. As opposed to the one week's notice given to Mr. Bennett, Respondents in this case had over one year's notice that the Region would offer the prior testimony of its witnesses on direct and then tender the witnesses for cross-

examination. What is more, nearly nine months before the hearing Respondents were given the specific transcript page citations for all of the testimony to be introduced by the Region at the hearing, thus giving them ample time and resources to prepare for cross- examination. And unlike in Bennett where the adverse witnesses were not present at the hearing, the Region in this case made its witnesses available in person for cross- examination. Despite being afforded these generous opportunities, Respondents refused to conduct any cross-examination or present any defense. Their refusal to take advantage of these opportunities cannot be assigned as error on the part of the Presiding Officer. In the words of the Court of Appeals for the Tenth Circuit, "having foregone the available opportunities for cross- examination, [Respondents] cannot ascribe error on that ground." Id. We therefore hold that the Presiding Officer's decision to permit the Region to rely on testimony and evidence from the 1984 hearing to establish its entire direct case at the 1994 hearing was an exercise of sound discretion and comported with the requirements of due process. [FN32]

3. Admissibility of Evidence from 1984 Hearing

We now turn to Respondents' assertion that the evidence from the 1984 hearing is inadmissible as to them. This assertion appears to rest on six contentions which purport to illustrate that the admission of testimony from the 1984 hearing was improper. See Resp. Br. at 21-22. [FN33] We will first demonstrate why Respondents' general assertion that the evidence is inadmissible must be rejected. We will then respond separately to each of Respondents' six related contentions.

The mere fact that Respondents were not parties at the time of the 1984 hearing does not preclude evidence from that proceeding from being introduced against them at the hearing in 1994. The controlling

inquiry in determining whether particular evidence is admissible is whether the evidence is relevant, probative and reliable. See 40 C.F.R. s 22.22(a) ("The presiding officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious or otherwise unreliable * * *."). A presiding officer has broad discretion in determining what evidence is properly admissible and his rulings on such matters are entitled to substantial deference. See, e.g., In re Sandoz, 2 E.A.D. 324, 332 (CJO 1987) ("[T]he admission of evidence is a matter particularly within the discretion of the administrative law judge because he is hearing the case first-hand and therefore, his rulings are entitled to considerable deference."). [FN34]

The evidence offered by the Region to establish its case, comprised in large part of the 1984 testimony of Ms. Becker, Dr. Homer and Mr. Shillman, was probative, relevant and reliable, and thus properly admitted against Respondents.

Ms. Becker's testimony in 1984 covered the conditions she observed during her inspection of Respondents' facility and her conversations with its operator, Mr. Shillman. These observations formed the basis for the RCRA violations alleged in the Region's complaint, and are therefore central to the liability of any party charged with those violations. As such, the relevance and probative value of Ms. Becker's 1984 testimony is readily apparent. The testimony was reliable as it was taken under oath and Ms. Becker was subjected to lengthy and thorough cross- examination. [FN35] In light of these facts Ms. Becker's prior testimony was properly admitted against Respondents.

Dr. Homer's 1984 testimony described the method and manner in which he calculated the penalty for the violations set forth in the Region's complaint. Although these calculations were not adjusted to

account for the conduct of any of the Respondents as individuals, Dr. Homer's testimony was still relevant as evidence of the appropriate penalty for the violations alleged in the Second Amended Complaint. [FN36] The testimony was thus clearly relevant and admissible, as would have been any rebuttal evidence showing that the penalty should be reduced against an individual Respondent due to his, her, or its good faith conduct. [FN37] Dr. Homer's testimony was also reliable, as it too was given in court, under oath and subject to lengthy and thorough cross- examination. [FN38]

Finally, the prior testimony of Mr. Shillman is unquestionably admissible against Respondents. This testimony -- covering in substantial detail the operations of the facility, Shillman's role as the facility's operator, the relationship between the Partnership and the Corporation, and an explanation of Ms. Brueggemeyer's role in each entity -- bears directly upon the liability of each Respondent for the violations alleged in the complaint. The testimony was given under oath and subject to cross- examination and therefore is inherently reliable.

Further, Mr. Shillman's testimony was inculpating to a great degree: he not only admitted that the facility was in violation of certain statutory requirements, but he also identified the other Respondents as responsible parties. [FN39] These highly probative and reliable "party admissions" are certainly admissible against all Respondents. [FN40] We now address Respondents' individual contentions.

a. Opportunity to "hear the evidence"

Respondents claim they had "no opportunity to hear the evidence and meaningfully engage in cross- examination." Resp. Br. at 22-24. More particularly, Respondents assert:

> These [Respondents] were entitled to hear the evidence against them from the mouths of witnesses competent to testify before they could, or had any obligations to "set the record straight."

Id. at 22. We know of no authority requiring such needless repetition of prior testimony. To the contrary, the Consolidated Rules exclude evidence which is "unduly repetitious." 40 C.F.R. s 22.22(a). The Consolidated Rules also expressly permit the use of sworn statements in lieu of live testimony. Id. at ss 22.22(c) & (d). Moreover, as we have noted throughout this discussion, Respondents were given ample time to prepare their defense and ample opportunities to cross-examine the Region's witnesses, or to call their own witnesses to the stand. Their complaints are therefore without merit.

b. Opportunity to Object

Respondents claim that because they were not present at the 1984 hearing to interpose objections to the testimony taken at that time, that testimony should be excluded. Resp. Br. at 24-25. The Presiding Officer correctly identified the flaw in this argument: Respondents fail to identify a single objection they might have made that was not made by the Corporation. Initial Decision at 12. Further compounding this glaring deficiency, Respondents do not show that they were prohibited from making the necessary objections to that evidence at the hearing in 1994. In fact, Respondents can scarcely make such a claim, since the Presiding Officer expressly invited them to state whatever objections they had to introduction of the prior testimony. 1994 Tr. at 64, 77. That invitation was certainly broad enough to encompass evidentiary objections. However, Respondents did not take advantage of this opportunity, either at the hearing or in their post-hearing brief.

Simply put, Respondents have failed to demonstrate how they were prejudiced, especially since they were given wide latitude at the 1994 hearing to cross- examine witnesses and put on a full- fledged defense. Therefore, the alleged inability to make unspecified objections to unspecified prior testimony simply is not a deprivation of due process.

c. Prior Cross-Examination

Respondents claim: "The prior cross-examination reflected the corporation's trial strategy without consideration of the defenses that these [Respondents] have." Resp Br. at 25. Respondents utterly fail to identify in what way the lengthy and thorough cross- examination of the Region's witnesses at the prior hearing somehow did not serve their needs in 1994. In the absence of such specifics, it is difficult to assess what harm, if any, they have suffered.

Even assuming, however, that the prior cross- examination somehow fell short of their needs, Respondents had an opportunity to rectify that shortcoming by cross-examining those same witnesses at the hearing in 1994, yet deliberately forewent this opportunity. In attempting to justify their inaction, Respondents complain that this opportunity was merely "an invitation to rebut stale evidence" and that they were placed in the "untenable position" of having to " explain" evidence or fill in gaps. Resp. Br. at 27. We find these assertions unpersuasive. Rebutting evidence, filling in gaps and explaining away adverse evidence are the essence of preparing a defense in any case. And Respondents here had far greater advantages in preparing their defense than the ordinary defendant preparing for trial. The Region completely bared its trial strategy to Respondents over one year before the hearing, then practically drew them a road map of the evidence it

would use at trial, complete with transcript page citations to the evidence. At the hearing itself Respondents were invited to conduct "wide open," virtually unlimited cross-examination of the adverse witnesses.

In sum, Respondents had the Region's case laid out for them well in advance and were given a liberal opportunity to deploy every weapon in their defensive arsenal to attack and defeat that case. They were in no way limited to or by the prior cross-examination. Thus, Respondents' vague claim that the prior cross- examination was somehow insufficient is wholly without merit.

d. Hearsay

Respondents claim: "The 'record' developed at a time when the [Respondents] were not parties was, as to the [Respondents], inadmissible hearsay." Resp. Br. at 21, 27-28. [FN41] This hearsay claim is unfounded. As the Presiding Officer correctly pointed out (Initial Decision at 13), the hearsay rule is not followed in administrative proceedings. In re Great Lakes, 5 E.A.D. at 368.

Moreover, as demonstrated earlier, the evidence from the prior hearing which was introduced by the Region was probative, relevant and reliable, and, for these reasons, properly admitted by the Presiding Officer under 40 C.F.R. s 22.22(a).

e. The Region Did Not Make A Prima Facie Case

Respondents claim that "The evidence adduced at the hearing in 1984 did not relate in any manner to the [Respondents]. As such, that evidence was insufficient as a matter of law to make out the prima facie

case that EPA was required by law to prove." Resp. Br. at 29. We wholly reject this statement and similar incarnations of it which appear throughout Respondents' brief. See id. at 18-19, 22, 28-29. As a general matter, it is the substance, not the form, of evidence which determines whether a prima facie case has been made. See 40 C.F.R. s 22.24 (prima facie case is established by proving violations alleged). Here, the violations alleged in the complaint were supported by the 1984 testimony of Ms. Becker, Dr. Homer and Mr. Shillman. This prior testimony, permissibly introduced at the 1994 hearing in transcribed form, was highly probative of Respondents' liability and also inherently reliable, as it was given under oath and subject to cross-examination. See discussion supra Section II.B.3. Thus, concrete evidence establishing Respondents' liability was in fact admitted at the 1994 hearing, and the burden had shifted to Respondents to rebut or disprove that evidence, which they failed to do.

f. Assessment of Witnesses

Respondents' final complaint is that they were "deprived of the right [FN42] to have a neutral presiding officer hear the evidence against them, observe the demeanor of the witnesses, hear the cross-examination and assess the witness' credibility and the extent to which they lacked credibility due to interest, bias or corruption." Resp. Br. at 22 (emphasis added).

As we have repeatedly demonstrated throughout this discussion, Respondents were certainly given the opportunity to have the Presiding Officer hear witness testimony. They were invited to conduct liberal, wide-ranging, cross- examination of the Region's witnesses (1994 Tr. at 4, 6), and it is during cross-examination that the credibility of witnesses can be most seriously tested. They were also

permitted to introduce whatever evidence they desired in their own defense. Id. at 13. This evidence could have consisted of testimony from any witness Respondents desired to call in their behalf, including, if Respondents had so desired, a brand new direct examination of their chief witness, Mr. Shillman. [FN43] Respondents forwent all of these opportunities. Since the error they claim resulted from Respondents' deliberate inaction and not from any arbitrary or capricious decision by the Presiding Officer, Respondents' contentions are devoid of merit.

C. Penalty

The only remaining issue is whether Respondents are liable for the penalty assessed against them. We note that Respondents' Appeal focuses exclusively on issues regarding the nature of the hearing and the statute of limitations, and fails to address the substance of the findings of liability and the amount of the penalty. As such, we need not consider these substantive issues. [FN44] We therefore affirm the Initial Decision both as to liability and penalty.

III. CONCLUSION

For the foregoing reasons, we affirm the Initial Decision and assess a penalty of $23,500 against Respondents jointly and severally. Respondents shall pay the full amount of the civil penalty within sixty (60) days of the date of service of this decision. Payment shall be made by forwarding a cashier's check, or certified check in the full amount payable to the Treasurer, United States of America, at the following address:

EPA--Region V
Regional Hearing Clerk
United States Environmental Protection Agency
P.O. Box 70753
Chicago, IL 60673

So ordered.

FN1 Environmental Appeals Judge Kathie A. Stein did not participate in this decision.

FN2 Throughout their brief, Respondents refer to themselves as "Petitioners." Where the term "Petitioners" or "Appellants" appears in material quoted from the parties' briefs or other documents from these administrative proceedings, we have substituted the term "Respondents." Our substitutions are earmarked by brackets (i.e. [Respondents]) so as to eliminate confusion.

FN3 Respondents present for appellate review two issues attacking the propriety of the use of evidence from the 1984 hearing against them at the hearing in 1994. [Respondents'] Appellate Brief ("Resp. Br.") at 2, issues 4 and 5. Issues 4 and 5 interrelate and overlap, making separate review and discussion of them difficult. Thus, for purposes of identifying the issues on Appeal, we have consolidated issues 4 and 5 into a single issue relating to the use of evidence from the 1984 hearing. Although our discussion does not precisely track the issues as they are articulated in Respondents' brief, we believe our approach promotes clarity and addresses all of Respondents' contentions on Appeal.

FN4 The first two Appeals were decided by the Agency's Chief Judicial Officer. As of March 1, 1992, the authority to decide Appeals from initial decisions was delegated to the Environmental Appeals Board. See 57 Fed. Reg. 5324-5326 (Feb. 13, 1992) (revising Part 22 to reflect role of new Environmental Appeals Board).

FN5 Although she was an employee of the Ohio EPA, Ms. Becker's inspection was conducted on behalf of the United States Environmental Protection Agency pursuant to a cooperative agreement between those two agencies. 1984 Tr. at 35.

Ms. Becker began her inspection on December 8, 1980, but was unable to complete it that day because Mr. Shillman was unavailable and much of the information she sought was inaccessible. She therefore returned to the site on December 17, 1980 and completed the inspection on that day. 1984 Tr. at 50-51; Complainant's Exhibit ("C Ex") 1 at 2 (RCRA Inspection Report).

FN6 Since it began operation before November 19, 1980, the Partnership was subject to the "Interim Status Standards." See RCRA s 3005(e), 42 U.S.C. s 6925(e). Essentially, this provision permits a facility to operate while its permit application is being reviewed by the EPA, so long as the facility satisfies certain specified requirements. Id. These requirements are the " Interim Status Standards" which are set forth in 40 C.F.R. part 265.

During her inspection Ms. Becker noted the followingviolations of 40 C.F.R. Part 265:

- failure to obtain a detailed chemical and physical analysis of waste handled at the facility;

- failure to develop and follow a written waste analysis plan;

- failure to secure the perimeter of the facility;

- failure to post "keep out" signs;

- failure to maintain a written inspection schedule and log;

- failure to maintain written job descriptions and training records;

- failure to install an emergency alarm or communication system;

- failure to maintain adequate emergency equipment;

- failure to maintain an adequate sprinkler system or its equivalent;

- failure to maintain adequate aisle space;

- failure to make arrangements with state and local emergency response authorities;

- failure to maintain a contingency plan;

- failure to maintain a written operating record;

- failure to make required records available to U.S. EPA representatives upon reasonable request;

- failure to maintain hazardous waste containers in a closed condition;

- failure to keep flammable waste more than 50 feet from the property line; and

- failure to have a closure plan.

See In re J.V. Peters & Company, Inc., 2 E.A.D. 177, 178 n.4 (CJO 1986).

FN7 The facts relating to the formation of the Partnership and Corporation are taken from the following sources: (1)Mr. Shillman's, Ms. Brueggemeyer's, the Partnership's, and the Corporation's Answers to the Second Amended Complaint, dated November 30, 1987; and (2) 1984 Tr. at 430-433; 549-559.

FN8 Administrative Law Judge Jones was the presiding officer in these administrative proceedings from 1984 to 1991. After the case was remanded for the second time in 1991, a new presiding officer, Administrative Law Judge Harwood, was assigned. To prevent confusion we shall refer to ALJ Jones by name and reserve the term "Presiding Officer" to refer to ALJ Harwood.

FN9 See A Framework for Development of a Penalty Policy for Resource Conservation and Recovery Act (RCRA) (December 31, 1980) ("1980 RCRA Penalty Policy") and Guidance on Developing

Compliance Orders Under Section 3008 of Resource Conservation and Recovery Act (July 7, 1981) ("1981 Guidance Memo").

FN10 In responding to the Corporation's motion, ALJ Jones remarked: "I'm not going to dismiss the case, but if you want to argue the point about the partnership and the corporation, you can." 1984 Tr. at 418. He went on to invite the Corporation to address in its post-hearing brief the issue of whether the corporate veil could or should be pierced. Id.

FN11 Mr. Vasi defaulted, thus admitting all of the allegations in the Second Amended Complaint. See 40 C.F.R. s 22.17(a) ("Default by Respondent constitutes * * * an admission of all facts alleged in the complaint * * *.").

12 Section 2462 of Title 28 of the United States Code provides in pertinent part:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty or forfeiture * * * shall not be entertained unless commenced within five years from the date when the claim first accrued * * *.

FN13 ALJ Jones found that the Corporation was not liable for any of the alleged violations because it did not exist at the time of the violations.

FN14 John Vasi did not Appeal so the initial decision became final as to him. See 40 C.F.R. s 22.27(c) (initial decision becomes final

within 45 days after service unless a party Appeals the matter or Board exercises sua sponte review).

FN15 Reviewing the terms of RCRA s 3008(b), which provides that an order becomes final unless a person requests a public hearing, the District Court held:

> Under the statute, it is stated that the Administrator, and by delegation * * * the ALJ, shall conduct a public hearing upon respondents' request. The statute does not allow the ALJ discretion to deny the hearing for any reason, not even if he believes there are no factual issues to resolve.

J.V. Peters v. Reilly, slip op. at 14.

We do not believe that this is an accurate statement of the law, as this Board has held that the accelerated hearing procedure criticized by the District Court is properly utilized precisely in the situation where there are no factual issues in dispute. See In re Green Thumb Nursery, Inc., FIFRA Appeal No. 95-4a, slip op. at 14-16 (EAB March 6, 1997), 6 E.A.D. ___(principle that party waives its right to adjudicatory hearing by failing to raise disputed material facts was cited with approval by Supreme Court in Costle v. Pacific Legal Foundation, 445 U.S. 198, 214 n. 12 (1980)). Further, we have recognized that a "hearing" may consist solely of documentary submissions in appropriate cases. See, e.g., In re General Electric Company, 4 E.A.D. 615, 627 (EAB 1993) (documentary submissions are all that is necessary to satisfy due process requirement for "hearing" in highly technical matters). However, our disagreement with the District Court

on this matter is immaterial since, in this case, Respondents did receive the "hearing" mandated by the District Court.

FN16 These submissions were filed pursuant to an order by the Presiding Officer, since Respondents failed to meet the deadline for pre-hearing exchanges. The submissions were identical in all respects except the following: Mr. Shillman's submission denied that he was a partner in the Partnership and Ms. Brueggemeyer's submission denied that she controlled the affairs of the Partnership on the date of the alleged violations. Respondents' submissions were all prepared and submitted by the same attorney who had represented the Corporation at the 1984 hearing.

FN17 In this supplemental pre-hearing exchange the Region also identified those portions of the testimony which it contended established Respondents' liability, and stated that it would make Ms. Becker and Dr. Homer available at the hearing for cross-examination.

FN18 On March 18, 1994, the Region filed a motion to amend its complaint to reflect that some of the violations extended beyond December 17, 1980. The motion was granted on April 19, 1994, and Respondents were ordered to file answers to the "Third Amended Complaint." Respondents' answers raised, among other issues, the statute of limitations defense. Later, Respondents moved to dismiss the Third Amended Complaint on the ground that it was time-barred. On August 24, 1994, the Region filed a motion to withdraw its Third Amended Complaint and to reinstate the Second Amended Complaint as the operative complaint in these proceedings. This motion was granted on September 26, 1994.

FN19 See Order (Sept. 26, 1994). This order denies Respondents' "motion to dismiss and for an accelerated decision" (id. at 5), which actually challenged the Third Amended Complaint. Since that complaint had been withdrawn, the Presiding Officer reviewed Respondents' motion as though it was addressed to the Second Amended Complaint.

FN20 We are aware that Respondents had lodged an objection before the Presiding Officer established the hearing format. However, they expressed no objection to the format once it was established. Moreover, when they made their earlier objection, Respondents indicated that they would nonetheless proceed with the hearing, and went on to identify the witnesses and documents they planned to introduce to establish their defense.

FN21 In their post-hearing brief Respondents had once again raised their statute of limitations arguments, requesting that the Presiding Officer reconsider his ruling rejecting this defense. The Presiding Officer stood by his original ruling on the issue, citing the reasons stated in his previous order. Initial Decision at 9 n.20.

FN22 In particular, with respect to Mr. Shillman's testimony in 1984, the Presiding Officer rejected Respondents' argument that such evidence was not admissible because the strategy pursued by the Corporation in 1984 was different from that which would have been pursued if Respondents were parties at that time, stating that Respondents "were given the opportunity either by recalling Mr. Shillman, or by other evidence to correct whatever inaccuracies there may have been in his testimony or to fill in any gaps that were not thought to be important at that time. Again Respondents chose not to avail themselves of this opportunity." Initial Decision at 14-15.

FN23 Finding the evidence on closure requirements and procedures inconclu- sive, the Presiding Officer dismissed the portion of the complaint alleging that Respondents failed to follow the applicable closure process. Initial Decision at 20- 21.

FN24 The Region did not Appeal this reduction in the penalty. We note, however, that the Region argues in its reply brief that a larger penalty should be awarded. Complainant's Reply Brief ("Cmpln. Br.") at 4 n.3. We will not consider this argument since the Region has not Appealed the amount of the penalty. See In re Ashland Oil, Inc., Floreffe, PA, 4 E.A.D. 235, 238 (EAB 1992) (Region's failure to Appeal penalty amount precludes consideration of arguments in reply brief urging increase in penalty); and In re ALM Corporation, 3 E.A.D. 688, 694 n.12 (CJO 1991) (same).

FN25 See In re J.V. Peters and Company, Docket No. V- W- 81-R-75, slip op. at 9- 10 (ALJ, Sept. 26, 1988) (initial decision by Judge Marvin Jones granting Region's motion for accelerated decision); In re J.V. Peters & Co., Inc., 3 E.A.D. 280, 284-290 (CJO 1990) (Chief Judicial Officer Ronald McCallum's final decision affirming Judge Jones' initial decision); J.V. Peters v. Reilly, slip op. at 12-13 (U.S. District Judge Manos' affirmance of CJO McCallum's decision on the statute of limitations issue); Order (Sept. 26, 1994) (ALJ Harwood's denial of Respondents' motion to dismiss and for accelerated decision); and Initial Decision at 9 n.20 (Judge Harwood's refusal to reconsider his ruling rejecting Respondents' statute of limitations defense).

FN26 See also In re Bethenergy (Bethlehem Steel Corporation), 3 E.A.D. 802, 805 n.5 (CJO 1992) (citing and quoting Moore's Fed. Prac. for general rule).

FN27 See, e.g., In re Wella A.G., 858 F.2d 725, 728 (Fed. Cir. 1988) ("[T]he rule is equally applicable to the duty of an administrative agency * * * to comply with the mandate issued by a reviewing court * * *.").

FN28 On this last point, the Presiding Officer assured Respondents' attorney, "[Y]ou'll be free to present whatever case you want with respect to [Respondents]." Id. at 13.

FN29 Respondents' due process claims are subsumed within their arguments criticizing the Presiding Officer's utilization of evidence from the 1984 hearing on the basis of its alleged inconsistency with the Remand Order and its alleged inadmissibility against Respondents. For example, Respondents mention that "Judge Manos certainly did not hold that * * * due process merely required EPA to give the non-parties an opportunity to present evidence in their defense in response to the 'record' developed against a non-party 9 years ago." (Resp. Br. at 20), but do not further develop their due process claim in that discussion. Similarly, Respondents claim in an argument heading that: "The Procedure Sanctioned by [the Presiding Officer] * * * Deprived [Respondents] of Due Process of Law" (Resp. Br. at 21-30), but instead of discussing their due process claims, they focus on why the 1984 evidence was improperly admitted against Respondents.

FN30 See also In Re General Electric Company, 4 E.A.D. 615, 627 (EAB 1993) ("[T]he due process clause guarantees that before a deprivation of property occurs, [a] person * * * must be given notice of the * * * deprivation and an opportunity for a hearing * * *.") and In Re Green Thumb Nursery, Inc., FIFRA Appeal No. 95-4a, slip op. at 13 (EAB March 6, 1997), 6 E.A.D.___ (acknowledging respondent's

constitutional right to opportunity to be heard before imposition of civil penalty).

FN31 Further, the Supreme Court has recognized that due process does not require a full-blown adversary hearing with oral presentation of evidence by both sides in every case. See, e.g., Mathews v. Eldridge, 424 U.S. at 334, citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("[D]"ue process is flexible and calls for such procedural protections as the particular situation demands."). Consistent with this notion, this Board has held that "hearings" comprised solely of documentary submissions are perfectly in keeping with the requirements of due process, given the highly- technical arena in which these environmental enforcement and compliance cases arise. See In re General Electric, 4 E.A.D. at 627, 639 (in the context of RCRA permit modification process documentary "hearings" are sufficient since "corrective action determinations turn on technical data which is amenable to effective written presentation"); and In re Green Thumb Nursery, Inc., slip op. at 10 n.14 (recognizing that under certain circumstances disposition of a matter on motion papers alone constitutes a "hearing" which satisfies due process).

FN32 We note that the Region's prima facie case was comprised of testimony from the 1984 hearing, documents marked as exhibits at that hearing, and also Respondents' answers to the Second Amended Complaint and their pre-hearing submissions. See Preliminary List of Excerpts of the Administrative Record Relied on By Complainant on Remand, p.2, attached to Krueger letter. Since Respondents' due process challenge does not specifically address any of the documentary evidence, we need not analyze that evidence separately. However, our decision on the due process issue covers the

testimony as well as the documents which were introduced from the 1984 hearing.

FN33 It is unclear whether these six contentions are offered in support of Respondents' due process claims or are intended to support their claims that the evidence was inadmissible, since Respondents' brief uses these concepts interchangeably. See Resp. Br. at 21; see also discussion supra n.30. We assume that the contentions are part of Respondents' claims that evidence from the 1984 hearing was inadmissible against them and address each contention separately infra at Sections II.B.3.a - II.B.3.f. To the extent the contentions are intended to support Respondents' claims of due process, we refer to our earlier discussion demonstrating that Respondents' due process claims lack merit.

FN34 See also, In re Great Lakes Division of National Steel Corp., 5 E.A.D. 355, 369 (EAB 1994) (citing and quoting from Sandoz); In re Celotex Corp., 3 E.A.D. 740, 743 (CJO 1991) (quoting 40 C.F.R. s 22.22(a) and Sandoz); and In re Rocky Mountain Prestress, Inc., 2 E.A.D. 4, 8 (CJO 1985) (noting presiding officer's broad discretion to admit evidence).

FN35 We address infra at Section II.B.3.c, Respondents' arguments that counsel's cross- examination of Ms. Becker and Dr. Homer in 1984 was somehow inadequate for their defense strategy in 1994.

FN36 The penalty was calculated based on violations committed by "the facility," not by any of the individual Respondents. 1984 Tr. at 345-346. For each violation or group of violations Dr. Homer calculated the penalty as follows: he first determined the

appropriate class for the violation, then rated as either minor, moderate or major the damage or potential damage caused by such violation. He next rated as either minor, moderate or major the conduct of the facility. Finally, using the matrix system described in the policy, he affixed a penalty amount for the specific violation or group of violations. Id. at 345. Dr. Homer made no adjustments to the penalty for mitigating or aggravating conduct, as he believed that the mitigating factor that the facility had not been in operation since 1981, and the aggravating factor that the facility had not complied with the regulations while it was operating, balanced each other out. Id. at 346.

FN37 See 1980 RCRA Penalty Policy at 5-6, 14-18 (recognizing that penalty calculations must take into account the conduct of the particular individual or entity upon whom penalty will be imposed so as to determine whether modifications in the dollar value of the proposed penalty are warranted). We note that the Presiding Officer was free to give the testimony of Dr. Homer and any other evidence, including that which might have been offered (but was not) to show that the penalty should be reduced, as much or as little weight as he deemed appropriate in determining a penalty. See 40 C.F.R. s 22.27(b) (presiding officer must consider, but is not bound by, any applicable civil penalty guidelines).

FN38 Respondents claim that the Presiding Officer erroneously treated the prior testimony of Ms. Becker and Dr. Homer as "verified statements" under 40 C.F.R. s 22.22(c). See Resp. Br.at 22-23 & n. 21.

Section 22.22(c) provides in pertinent part:

> The Presiding Officer may admit * * * into the record as evidence, in lieu of oral testimony, statements of fact or opinion prepared by a witness. The admissibility of the evidence contained in the statement shall be subject to the same rules as if the testimony were produced under oral examination * * *. The witness presenting the statement shall swear to or affirm the statement and shall be subject to appropriate oral cross- examination upon the contents thereof.

According to Respondents, Ms. Becker's and Dr. Homer's prior testimony should not have been admitted as verified statements because neither witness prepared the testimony or properly verified it. Resp. Br. at 23. As we have demonstrated, the testimony of both Ms. Becker and Dr. Homer was properly admitted under Sections 22.22(a) & (b). In light of this, we find it unnecessary to determine whether the testimony of either witness is technically a "verified statement" under Section 22.22(c).

FN39 See, e.g., 1984 Tr. at 482, 497, 588-590 (admitting knowledge that the facility was in violation of certain RCRA requirements). See also id. at 432-433, 436; 549-551 (explaining Shillman's purpose and intent in forming the Partnership, and his and Ms. Brueggemeyer's roles therein).

FN40 Although the Federal Rules of Evidence are not applicable in administra- tive hearings under the Consolidated Rules, (see In re Great Lakes Division of National Steel Corp., 5 E.A.D. 355, 368 (EAB 1994)), and hearsay rules do not apply, we note that Mr.

Shillman's statements are admissions which have great probative value under those rules. Specifically, Rule 801(d)(2)(A)provides:

> A statement is not hearsay if:
>
> Admission by Party-Opponent. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

FN41 Respondents do not further develop this hearsay argument. Instead they acknowledge that the assertion quoted in the text was rejected by the Presiding Officer, then move on to discuss the alleged absence of a meaningful opportunity to confront the Region's witnesses and the Region's alleged failure to make a prima facie case. See Resp. Br. at 27-28. We address these latter contentions supra at Section II.B.3.a and infra at Section II.B.3.e, respectively.

FN42 There is no "right" to have a presiding officer hear testimony; the presiding officer is qualified to render a decision so long as he or she has reviewed the testimony and given it appropriate weight. See, e.g., Guerrero v. New Jersey, 643 F.2d 148, 149 (3d Cir. 1981) ("It has been settled since Morgan v. U.S. * * * that in administrative

adjudications, deciding officers need not actually hear the witnesses' testimony * * * [so long as] the decision is based solely on a considered review of the evidence and legal arguments."); NLRB v. Stocker, 185 F.2d 451, 452-453 (3d cir. 1950) (due process proceedings before NLRB do not require that testimony be evaluated by officer who heard and observed witnesses); and Morgan v. U.S., 298 U.S. 468, 481 (1936) (establishing general rule that deciding body need not hear but must evaluate testimony).

Here, the Presiding Officer repeatedly stated that he would review the entire record, including all of the testimony from the 1984 hearing. 1994 Tr. at 64, 74, 77, 82. We do not doubt that he did so.

FN43 Respondents imply that the prior testimony of Mr. Shillman was impro- perly admitted against them because the Corporation pursued a different trial strategy in 1984 than that pursued by Respondents in 1994. Resp. Br. at 25-26. As the Presiding Officer correctly pointed out, Respondents could have cured this alleged problem by conducting a fresh examination of Mr. Shillman. See discussion supra n.22.

FN44 In any event, it is clear that the Presiding Officer carefully evaluated the evidence offered in support of the proposed penalty, as is evidenced by his modest reduction in the penalty to account for dismissal of the closure procedure violation. See Initial Decision at 24.

7 E.A.D. 77, 1997 WL 221388 (E.P.A.)

Before the United States Environmental Protection Agency
Office of the Administrator

IN THE MATTER OF J.V. PETERS AND COMPANY, INC., J.V. PETERS AND COMPANY A PARTNERSHIP, DAVID B. SHILLMAN, DOROTHY BRUEGGEMEYER AND JOHN VASI, RESPONDENTS

Resource Conservation and Recovery Act

Docket No. V-W-81-R-75
July 18, 1995

Appearances:
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INITIAL DECISION ON COURT REMAND

At a hearing held because the individual Respondents had not been given adequate notice of prior hearing, incorporation of evidence presented at prior hearing does not deprive Respondents of a fair hearing where Respondents were given the opportunity to cross-

examine the witnesses on their prior testimony and to present evidence on their own behalf.

The operator of a hazardous waste facility and the partners of the partnership that owned the facility held jointly and severally liable for RCRCA violations.

OPINION

This proceeding is on a complaint issued on September 9, 1987, pursuant to the Resource Conservation and Recovery Act of 1976, as amended ("RCRA"), s 3008(g), 42 U.S.C. s 6928, seeking civil penalties against Respondents for alleged violations of the Act. [FN1] The proceeding is on remand from the United States District Court pursuant to its opinion and order in the case of J.V. Peters and Company, Inc. v. Reilley, No. 1:90 CV 2246 (N.D. Ohio, August 13, 1991). In that case the district court set aside the Agency's Final Decision in J.V. Peters and Company, Inc., 3 EAD 280 (CJO August 7, 1990), assessing a civil penalty of $25,000 against Respondents David B. Shilling, Dorothy L. Bruggemeyer, J.V. Peters and Company, and remanded the case to the Administrative Law Judge to conduct an evidentiary hearing wherein Respondents Shillman, Bruggemeyer and J.V. Peters and Company, in the words of the court, "are given an opportunity to present evidence to contest their liability for the $25,000, civil fine assessed against them." [FN2]

The hearing on remand was held in Cleveland, Ohio, on October 3, 1994. Both sides filed post-hearing briefs, and this initial decision is rendered on consideration of the entire record in this proceeding and the submissions of the parties.

I. Prior Administrative Proceedings.

The proceedings leading to the district court's remand are set out in the court's memorandum opinion. [FN3] They will only briefly be summarized here.

These proceedings were initially on a complaint naming only the corporation, J.V. Peters and Company, Inc., as respondent. [FN4] Following a three-day hearing before an administrative law judge, ("ALJ"), an initial decision ("ID- 1") was issued in this matter in 1985. In his initial decision the ALJ sustained the allegations of the complaint with respect to the violations but found that at the time of the EPA's inspection in December 1980, on which the violations were based, the facility was owned and operated by J.V. Peters and Company, a partnership, and that David B. Shillman was the person responsible for the overall operation and the managing partner. [FN5] The ALJ assessed a penalty against Respondent David B. Shillman, individually and as managing partner of the partnership of $25,000. No penalty was assessed against the corporation.

The decision was Appealed to the Administrator. On May 9, 1986, the Chief Judicial Officer, who then decided Appeals for the Administrator, issued his order remanding the case to the ALJ. The Chief Judicial Officer found that Shillman and the partnership had not been given fair notice of their liability for the violations, and had not had a fair hearing on the issue. [FN6]

On remand, Complainant was granted permission to file the second amended complaint, which is the current complaint in this

matter. Following the filing of Respondents' answers to the second amended complaint, complainant moved for an accelerated decision pursuant to the applicable rules of practice, 40 C.F.R. s 22.20.

The ALJ granted the motion and issued his Accelerated Decision on Remand (hereafter "ID-2") on September 30, 1988. The ALJ reaffirmed his previous findings as to the violations and included additional findings of fact relating, in general, to the operations of the facility by the partnership prior to incorporation, the formation of the corporation and transfer of the business to it and the operation of the business following incorporation. [FN7] He found that Respondents Dorothy Brueggemeyer and John Vasi as partners were jointly and severally responsible for the civil penalty assessed for the violations, and that David Shillman as the one responsible for the operation and as a "de facto" partner was also responsible for the civil penalty. [FN8] An order was issued assessing a civil penalty of $25,000, against all Respondents except the corporation, for which they were made jointly and severally responsible. The corporation was found to be not responsible for the violations, because it was not in existence at the time, and no penalty was assessed against it.

Respondents Appealed the order again. A Final decision affirming the Initial Decision was filed on August 7, 1990. [FN9] The Chief Judicial Officer agreed that the remand did not require a retrial of whether the violations occurred. [FN10] He held with respect to Respondents' liability for the violations and the penalty, that Complainant could properly rely upon the pre-remand record in its motion for an acceleration decision. That record, the Chief Judicial Officer stated, and Respondents' answers to the second amended complaint established the facts, as found by the ALJ, that the partnership owned the facility, that Dorothy Brueggemeyer and John

Vasi were partners and David Shillman was the operator at the time of the violations, and that Respondents failed to produce any evidence to show that there was a genuine dispute over these facts. The Chief Judicial Officer, accordingly, held that an accelerated decision was properly granted and the order assessing the penalty against the partners individually was proper under Ohio law. [FN11]

II. The District Court's Remand.

Respondents Appealed the Final Decision to the United States District Court for the Northern District of Ohio. That court in a decision issued on August 13, 1991, set aside the Agency's order. [FN12] The court held that the accelerated decision arbitrarily denied Respondents the rights which the Chief Judicial Officer had found they were entitled to of presenting evidence to refute the charges against them. The court pointed out that even if it could be argued that Shillman had the capacity to assert his own interests by his appearance at the October 1984 hearing, he could not assert the rights of Brueggemeyer or the partnership of which he was not a member. The court further held that under 42 U.S.C. 6928 (RCRA s 3008), the Presiding Officer had no authority to deny Respondents a hearing for any reason, even if he believes that there are no factual issues to resolve. The court, accordingly, ordered the case remanded to the Presiding Officer to conduct an evidentiary hearing wherein petitioners David B. Shillman, Dorothy L. Brueggemeyer, and J.V. Peters and Company are given an opportunity to present evidence to contest their liability for the fine assessed against them. [FN13]

III. Administrative Proceedings Following Remand.

In accordance with the court's remand order, a hearing was convened in Cleveland, Ohio on October 3, 1994. Respondents' counsel, who also represented the corporation, the partnership and the individual Respondents in the prior proceedings, appeared at the hearing on behalf of the partnership, Shillman and Brueggemeyer. [FN14] Complainant proffered the previous testimony of its two witnesses, Ms. Becker and Dr. Homer along with the exhibits they relied upon, and made both witnesses available for cross-examination. [FN15] Complainant also stated his intention to rely upon the testimony of Mr. Shillman, the one witness who had been called by Respondents in the prior hearing. [FN16] Respondents declined to cross-examine Complainant's witnesses on their prior sworn testimony and argued, in general, that Complainant's reliance upon the prior testimony would not give Respondents the hearing that the court had held that they were entitled to. Respondents' position was that Complainant had to present its case anew, and Respondents were under no obligation to present any evidence on their behalf until Complainant had put on its case. [FN17] Respondents, accordingly, neither cross-examined any of Complainant's witnesses nor did they call any witnesses on their own behalf. [FN18]

IV. Discussion

The issues presented by the pleadings are (1) whether the violations alleged in the complaint occurred, (2) are the partnership and the individual Respondents liable for the violations and (3) what is the appropriate penalty.

In their brief, Respondents argue that the only evidence adduced at the hearing was the short testimony by Ms. Becker affirming

her testimony given at the previous hearing. Respondents were told at the hearing, however, that the initial decision would be made on consideration of the entire record, including the evidence presented at the 1984 hearing. [FN19] Respondents objected that as they were not parties to the 1984 hearing, the evidence presented at that hearing was inadmissible and reliance upon it deprives them of the fair hearing to which the court held they were entitled. They claimed that they were under no obligation to present evidence on their behalf until Complainant at this hearing had first made out a prima facie case on admissible evidence.

The question initially presented, accordingly, is whether Respondents, having been given the opportunity to cross-examine Complainant's witnesses on their sworn testimony at the prior hearing and to present evidence on their own behalf, will be deprived of a fair hearing if the evidence adduced at that prior hearing is made part of the record of this hearing and relied upon to determine Respondents' liability for a penalty. If Respondents prevail on this issue, the complaint must be dismissed. If Respondents do not prevail, it must then be determined whether the reliable and probative evidence of record, giving consideration to the record as a whole, supports a finding that the violations have occurred and that Respondents are liable for the penalty of $25,000, proposed in the complaint or for some lesser penalty. [FN20]

A. Reliance Upon Evidence Adduced At the Prior Hearing Does Not Deprive Respondents of a Fair Hearing.

There is no difference between the complaint before the ALJ in the 1984 hearing and the second amended complaint as to the violations charged with respect to the facility located at 17030 Peters

Road, Middlefield, Ohio. The testimony of the EPA's investigator, Ms. Becker, at the 1984 hearing concerned the same violations charged in the second amended complaint.

At the hearing in 1994, Complainant advised Respondents that he intended to rely upon Ms. Becker's testimony at the 1984 hearing and the exhibits introduced through Ms. Becker. [FN21] He thereupon called Ms. Becker to the stand solely for the purpose of having her affirm her previous testimony and then proffered her for cross-examination. [FN22] Respondents' counsel declined to engage in any cross-examination of Ms. Becker, even though it was made clear to him that he would be given the widest possible latitude in his cross-examination. [FN23]

Respondents' attempt to limit the record to Ms. Becker's brief testimony at the 1994 hearing is how Respondents would like to interpret the proceedings but in no way correctly states Complainant's position at the hearing and his purpose in putting Ms. Becker on the stand. Ms. Becker, having been put on the stand, affirmed her previous testimony and then was made available for cross- examination on her previous testimony. Respondents' counsel refused to cross- examine her [FN24]. Dr. Ferguson was not called as a witness because Respondents' counsel made it clear that he did not intend to cross-examine him either. [FN25] Except for the brief testimony of Ms. Becker, the hearing was spent in discussing Complainant's and Respondents' respective positions with respect to relying upon the testimony and exhibits put into evidence at the 1984 hearing and not making Complainant present its entire case again [FN26].

Respondents allege that relying upon the testimony given at the 1984 hearing, and making those witnesses available for cross-

examination did not satisfy the District Court's order that Respondents be given an evidentiary hearing on their liability for a penalty. The only specific statement said by the court about the evidentiary hearing was that each of the respondents be given an opportunity to present evidence in their own defense. [FN27] Here, Respondents have been given not only the opportunity to present evidence in their own defense through oral testimony but the opportunity to orally cross-examine the witnesses on their sworn testimony that will be used against Respondents. I do not construe the court's opinion as requiring anything more. The hearing now being afforded Respondents is completely different from the accelerated decision that the court was reviewing.

Respondents argue that the record of the 1984 hearing is deficient because the corporation, which was the only party, decided not to call various witnesses, deliberately declined to explore certain cross-examination and chose not to make a certain number of evidentiary objections since it knew it would not be liable anyway. Respondents now had the opportunity to set the record straight by calling whatever witnesses and presenting whatever evidence they considered relevant to meeting the charges against them. They were also given the opportunity to engage in whatever cross-examination with respect to the previous testimony of Complainant's witnesses that they thought necessary. [FN28] Having declined to take advantage of any of these opportunities, their arguments as to the asserted deficiencies in the 1984 record are unpersuasive.

As to Respondents' asserted prejudice from the failure to make evidentiary objections that they would have made if they had been parties, it would have been helpful in evaluating the merits of that argument, if Respondents had been more specific either at the 1994 hearing or in their brief as to what objections they would now raise to the testimony or evidence in the record of the 1984 hearing and the

grounds for them. The mere fact that they would have made objections does not mean that the objections would have had merit.

Respondents argue further that they were entitled to have the credibility of Complainant's witnesses on their direct testimony observed by the Administrative Law Judge now presiding. The argument has a certain superficial plausibility, but fails to take into account the factors that I would have in evaluating the witness' credibility, namely, the fact that the testimony was given under oath, the demeanor of the witness on cross-examination, the nature of the matters the witness was testifying to, and whatever facts were in the record or brought out in cross-examination that would bear upon the witness's possible bias, the witness's opportunity to observe the matters testified to, and possible flaws in the witness' narration of these matters.

Reliance upon the testimony and exhibits from the 1984 hearing has much to commend it in that it can expedite the hearing. This benefit may possibly be diminished by the time spent in arguing the procedure, but it can still result in a saving of the time and expense of the hearing as a whole. [FN29]

Respondents argue that the testimony taken at the prior hearing is hearsay that is admissible only under conditions that are not present here. As support for their argument they cite Fed.R.Evid. 804. What determines the admission of evidence in an administrative proceeding is whether it is reliable and of probative value, and not whether it complies with the Federal Rules of Evidence governing hearsay. [FN30] The EPA's witnesses, whose written testimony under oath is being considered here, were Ms. Becker, who made the investigation of the facility at which the alleged violations were discovered, and Dr. Homer, an EPA employee who was familiar with the RCRA regulations

and their application to the operation of the facility, and who had calculated the proposed penalty. [FN31] Clearly, their testimony at the former hearing had the attributes both of reliability and relevance to satisfy the broad standard of admissibility in an administrative proceeding. Respondents were given the opportunity to attack the probative value of their testimony both by cross-examination and by introducing countervailing evidence. They did not avail themselves of either opportunity. [FN32]

With respect to the testimony of Respondent David Shillman at the 1984 hearing, the only witness called by the party appearing as Respondent in the proceeding, there has never been any question but that he had overall responsibility for the operations at the facility from the beginning. Mr. Shillman so testified under oath at the 1984 hearing and he has admitted this in his answer to the second amended complaint. [FN33] Respondents argue that the trial strategy pursued by the Corporation in defending against the complaint was different from that which have been followed if Respondents had been properly made parties, because the Corporation "knew it could never be liable anyway." [FN34] Respondents, again, were given the opportunity either by recalling Mr. Shillman, or by other evidence to correct whatever inaccuracies there may have been in his testimony or to fill in any gaps that were not thought to be important at the time. Again Respondents chose not to avail themselves of this opportunity.

I find, accordingly, that reliance upon the testimony and evidence adduced at the 1984 hearing does not deprive Respondents of a fair hearing. It remains, then, to assess that evidence and, giving it such weight as it is entitled to taking into account its inherent probative value and any evidence in the record which detracts from the conclusions that may be drawn from any particular evidence, determine

whether Complainant has sustained its burden that the violations occurred as alleged and that the proposed penalty against Respondents is appropriate. [FN35]

B. Findings And Conclusions

1. Respondent J.V. Peters and Company, a partnership, in December, 1980, was engaged in the business of collecting, treating and storing hazardous waste at the facility located at 17030 Peters Road, Middlefield, Ohio (the "Facility"). Answers of Shillman & Brueggeman to p10 of the Complt. [FN36]; 1984Tr. 432-433, 436; Complainant's Exhibit ("CX") 4. [FN37] The partnership occupied the premises under a lease with an option to purchase. 1984Tr. 435.

2. Among the hazardous wastes Respondents reported handling were spent halogenated solvents (EPA hazardous waste nos. F001 and F002), plating bath residues (F008) and spent solutions from electroplating operations where cyanides are used in the process (F009). CX 4. At the time of the inspection in December 1980, Mr. Shillman admitted to storing flammable wastes and chlorinated solvents. 1984Tr. 290, 293; see also, RX 7c, Table One, listing wastes on site as of May 1982, including wastes accepted by the company shortly after it commenced operations.

3. Respondent Dorothy Brueggemeyer was a partner in the partnership. Answer of Brueggemeyer to p7 of the Complt; 1984Tr. 550. Ms. Brueggemeyer contributed $25,000 in capital to the partnership. 1984Tr. 551.

4. Respondent David B. Shillman managed the facility and was given complete authority over the operations of the facility. 1984Tr. 432, 508, Answer of Shillman to p19 of the Complt.

5. On December 17, 1980, Ms. Melinda Becker, an employee of the Ohio EPA working in cooperation with the U.S. EPA, Region V, made a RCRA inspection of the facility. 1984Tr. 39; CX 1. Ms. Becker found several violations of the RCRA Interim Status Standards (40 CFR Part 265) to which Respondents were subject.

6. Respondents violated 40 CFR s 265.13(a)(1) by failing to obtain a detailed chemical and physical analysis of representative samples of waste handled at the facility prior to its treatment and storage. 1984Tr. 53, 55, 225-226; CX 1.

7. Respondents violated 40 CFR s 265.13(b) by failing to develop and follow a written waste analysis plan. 1984Tr. 56, 224, 351; CX 1. The documents described generally by Mr. Shillman as being in the facility's file at the time, 1984Tr. 471, were not shown to have complied with the requirements of s 265.13(b).

8. Respondents violated 40 CFR s 265.14(b) by failing to install either a barrier around the active portions of the facility or 24-hour surveillance. 1984Tr. 57-58, 447-448; 475, 563-565; CX 1.

9. Respondents violated 40 CFR s 265.14(c) by failing to post signs bearing the legend "Danger--Unauthorized Personnel Keep Out" at each entrance to the facility. 1984Tr. 60-61, 477-478; CX 1.

10. Respondents violated 40 CFR s 265.15(b) and (d) in failing to create and maintain at the facility a written inspection schedule and log. 1984Tr. 64, 566; CX 1.

11. Respondents violated 40 CFR 265.16(d) by failing to create and maintain at the facility personnel records that list the job titles and describe the type and amount of continuing and introductory training provided to each hazardous waste management person. 1984Tr. 70, 482; CX 1.

12. Respondents violated 40 CFR 265.32(a) by failing to have installed an internal communications system or alarm capable of providing emergency instructions to facility personnel. 1984Tr. 80-81, 484; CX 1.

13. Respondents violated 40 CFR s 265.32(c) by failing to maintain adequate fire control equipment including decontamination equipment at the facility. 1984Tr. 86, 93-94; CX 1.

14. Respondents violated 40 CFR s 265.32(d) by failing to have available at the facility water at adequate volume and pressure to supply water hose streams, or foam producing equipment or automatic sprinklers or water spray systems. 1984Tr. 86, 568, 93-94.

15. Respondents violated 40 CFR s 265.34(a) by failing to provide all personnel involved in the pouring, mixing spreading or otherwise handling of hazardous waste with immediate access to an internal alarm or emergency communication device. 1984Tr. 80-81, 94, 484; CX 1.

16. Respondents violated 40 CFR s 265.35 by failing to maintain aisle space to allow the unobstructed movement of personnel, fire protection equipment, spill control equipment and decontamination equipment to any area of facility operation in an emergency. 1984Tr. 94-96, 273-274; CX 1.

17. Respondents violated 40 CFR s 265.37 by having failed to make the arrangements with state and local emergency response officials required by that regulation. 1984Tr. 99, 594; CX 1.

18. Respondents violated 40 CFR s 265.51 through 265.56 in that they failed to have a contingency plan for the facility. 1984Tr. 102, 574, 588, 595; CX 1.

19. Respondents violated 40 CFR s 265.73 by failing to maintain a written operating record at the facility. 1984Tr. 102-103, 280-281, 566.

20. Respondents violated 40 CFR s 265.74 in failing to make available upon request and at all reasonable times, all required records. The records were requested but not furnished or made available at the inspection in December 1980. 1984Tr. 53, 56, 64, 69-70, 102, 224-226, 588; CX 1. There is no evidence that the inspection was being conducted at an unreasonable time.

21. Respondents violated 40 CFR s 265.173(a) in that containers holding waste were not closed as required by the regulation. 1984Tr. 107-109.

22. Respondents violated 40 CFR s 265.176 by storing containers of flammable hazardous waste within 15 meters (50 feet) of the property line of the facility. 1984Tr. 110-111, 545, 562; CX 1, 10.

23. On January 30, 1981, J.V. Peters & Co., Inc. ("Corporation") was organized and took over the hazardous waste business of the facility. Respondents' answers to p 14 of the Complt.; 1984Tr. 433, 557.

24. Respondent Shillman was Chairman of the Board and President of the Corporation. Respondent Brueggemeyer was a Director and Secretary-Treasurer of the Corporation and also a stockholder. Answers of Respondent Corporation and Respondent Shillman to p17 of the Complt; CX 16. [FN38]

25. After the operation was taken over by the Corporation, Respondent Shillman continued to have overall responsibility for and to manage the operations at the facility. Respondent Shillman's answer to p19 of the Complt.

26. The complaint alleges that Respondents ceased all operations as a hazardous waste management facility at the location, have abandoned any attempt to resume operations at the facility and have not followed the closure proceedings required by 40 CFR s 265.110 through s 265.114. Complt. "Findings of Violation" No. 16. The record does show that Respondents did not have a written closure plan in place at the time of the inspection in December 1980.1984Tr. 355. This, however, was not considered a violation by Ms. Becker. [FN39] It also shows that a written closure plan was submitted in March 1982, in a Part B application, and that a revised Part B application was submitted in May 1982. RX 7B and 7C. Dr. Homer on reviewing this plan found it to be inadequate but these inadequacies were not communicated to the Respondents. 1984Tr. 372-373, 375-376. It also appears to be uncontested that the facility was closed. [FN40] I find, however, that this evidence is inconclusive on what closure

procedures were actually followed and, if there were any deviations from regulatory requirements, how material they were. [FN41] Accordingly, "Finding of Violation 16" in the Complaint is dismissed. In view of the dismissal of this count, it is unnecessary to consider Complainant's arguments with respect to disregarding the corporate structure under which Respondents continued the business after January 30, 1981.

C. The Liability of Respondents

The liability of Shillman is not predicated upon his alleged position as a partner but upon his being the operator of the facility within the meaning of RCRA, regardless of his technical status as partner. Mr. Shillman admitted to being responsible for the operations of the facility both at the time it was owned by the partnership and later by the Corporation. He organized the operation and acquired the property for it. [FN42] He was engaged in the daily running of the operation. [FN43] So far as this record is concerned, he made the decisions as to the facility's compliance with RCRA whether it was owned by the partnership or the corporation. In short, I find that Mr. Shillman exercised sufficient active and pervasive control over the operations as to make him an operator within the meaning of RCRA. [FN44]

The liability of Respondent Brueggemeyer is predicated upon her being a partner. It is not denied that the partnership owned the business in December 1980. Ms. Brueggemeyer's status as partner was admitted in her answer to the Complaint and testified to by Mr. Shillman. The details of the partnership arrangement are not spelled out in the record except that Ms. Brueggemeyer put $25,000 of capital into it. [FN45] Respondents have not seen fit to either explain or rebut this

evidence, and I find that it is sufficient to establish that Ms. Brueggemeyer was a general partner and subject to liability as such.

The Interim Status Standards apply to both owners and operators. [FN46] The Agency gave the following explanation as to why this is so:

> [T]he Agency is primarily concerned with compliance, and is secondarily concerned with who ensures compliance. The Agency believes that decisions concerning who should be responsible for ensuring compliance for which requirements can properly and adequately be a matter between the owner and the operator. Nonetheless, both the owner and operator ultimately remain responsible, regardless of any arrangement between them. [FN47]

The violations found in Findings Nos. 6 through 22 above relate to the operations of the facility in December 1980, when the business was owned by the partnership. "Owner" is defined as "the person who owns the facility" and "Person" is defined to include a partnership. [FN48] Ms. Brueggemeyer, accordingly, is found to be liable for those violations as a partner in the partnership owning the facility. [FN49]

D. The Appropriate Penalty

Dr. Homer testified for Complainant on how the proposed penalty was determined. [FN50] Dr. Homer has a Ph.D. in environmental science. [FN51] His work at the EPA has required that he be familiar with the RCRA regulations and the Agency's policy

interpretations of those regulations. [FN52] He reviewed the Agency's records with respect to the facility, including Ms. Becker's inspection report. [FN53] He evaluated each violation noted in the papers on the basis of what the damage or potential damage could be, the nature of the conduct and whether there were any mitigating factors, and then assigned a penalty in accordance with the Agency's penalty policy. [FN54]

Dr. Homer was made available for cross-examination at the 1994 hearing. [FN55] It was also open to Respondents to introduce whatever evidence or make whatever arguments they thought relevant to Dr. Homers' calculations. Respondents did not avail themselves of any of these opportunities at the hearing and have not done so in their post hearing brief.

I find that Dr. Homer is qualified as an expert to testify on the seriousness of the violations and on the Agency's policies with respect to determining the appropriated penalty. His calculations are entitled to weight and are accepted here. The only adjustment that needs to be made is for dismissal of Finding of Violation 16. In his calculations, Dr. Homer included a penalty of $4500 for failure to have a disposal plan at the time of the inspection. [FN56] Dr. Homer arrived at his proposed penalty by taking one-third the amount initially determined. [FN57] Applying the same adjustment here, the proposed penalty is reduced by $1500 to $23,500.

I find, accordingly, that the appropriate penalty is $23,500 for which Respondents David B. Shillman, Dorothy Brueggemeyer and J.V. Peters and Company are jointly and severally liable.

ORDER [FN58]

Pursuant to the Resource Conservation and Recovery Act, as amended, s 3008(g), 42 U.S.C. s 6928(g), Respondents David B. Shillman, Dorothy Brueggemeyer and J.V. Peters and Company are jointly and severally liable for a civil penalty of $23,500, for violations of the Act and the pertinent regulations. The full amount of the penalty shall be paid within sixty (60) days of the effective date of the final order. Payment shall be made in full by forwarding a cashier's check or a certified check in the full amount payable to the Treasurer, United States, at the following address:

EPA--Region 5
(Regional Hearing Clerk)
P.O. Box 360582M
Chicago, IL 60673

Gerald Harwood
Senior Administrative Law Judge

FN1 The complaint is actually styled the "Second Amended Complaint." The original complaint, issued against J.V. Peters and Company, Inc. was filed on April 17, 1981. For history of proceedings, see infra.

FN2 The Administrative Law Judge entered a default order against John Vasi, which Vasi did not Appeal. The order in the Initial Decision, accordingly, became final as to him. J.V. Peters & Company, Inc., 3 EAD 282 n. 4 (CJO August 7, 1990).

FN3 J.V. Peters & Co., Inc. v. Reilley, opinion at 2-10.

FN4 The original complaint was filed on April 17, 1981. That complaint was withdrawn without prejudice and an amended complaint increasing the proposed penalty from $10,000 to $25,000, and adding the allegation that Respondents had abandoned the facility without following an acceptable closure plan, was filed early in 1984.

FN5 ID-1 at 28. The corporation was organized on January 30, 1981. ID-1 at 9.

FN6 J.V. Peters & Company, Inc., 2 EAD 177 (CJO May 9, 1986)

FN7 ID-2, Findings of Fact Nos. 1-13. Judge Jones also found John Vasi in default since he did not file an answer to the Second Amended Complaint. ID-2, Finding 14.

FN8 ID-2 at

FN9 J.V. Peters and Company, Inc., 3 EAD 280 (CJO August 7, 1990), (hereafter "Final Decision").

FN10 Final Decision, 3 EAD 291.

FN11 Final Decision, 3 EAD 290-296. The Chief Judicial Officer also held that the amendment of the complaint to include the partnership, Brueggemeyer, Vasi and Shillman was not barred by the statute of limitations. Final Decision, 3 EAD 284-290.

FN12 J.V. Peters & Company, Inc. v. Reilley, No. 1:90 CV 2246 (N.D. Ohio Aug. 13, 1991)

FN13 J.V. Peters and Company, No. 1:90 CV 2246, slip op. at 13-16 (N.D. Ohio Aug 13, 1991). The court, however, did affirm the Chief Judicial Officer's decision that second amended complaint naming the partnership and the individual Respondents was not barred by the statute of limitations. slip. op. at 12.

FN14 Transcript of Proceedings ("Tr.") 20.

FN15 Tr. 16, 24, 30, 35, 45, 48-50, 50-51.

FN16 Tr. 53, 59.

FN17 Tr. 7 passim.

FN18 Tr. 83.

FN19 Tr. 74, 77, 82.

FN20 Respondents also contend that at the time the second amended complaint was filed, the statute of limitations had run as to the partnership, Shillman and Brueggemeyer. That claim was initially rejected by the Chief Judicial Officer in his final decision, and was rejected again by the district court on Appeal of the Final Decision. Supra, n. 13. The claim was also denied by me on Respondents' motion to dismiss. Order dated September 26, 1994. Respondents' request for reconsideration of my order is denied for the reasons stated by the district court and my order of September 26, 1994.

FN21 Tr. 16. Complainant stated that he intended to rely upon Ms. Becker's entire testimony including her cross-examination. Tr. 24.

FN22 Tr. 21-23.

FN23 Tr. 4, 14-15, 17, 24, 47.

FN24 Tr. 23-25. It should have come as no surprise to Respondents that Complainant at the 1994 hearing intended to rely upon Ms. Becker's testimony at the 1984 hearing. That procedure had been the subject of a prehearing conference with the parties as early as September 9, 1993. See letter of that date reporting on the conference. Respondents had been notified several months prior to the 1994 hearing as to what parts of the existing record Complainant intended to rely upon at the hearing. Letter of Complainant's counsel, Mr. Krueger, to Senior Administrative Law Judge Harwood dated January 31, 1994.

FN25 Tr. 48-52.

FN26 Tr. 26-82.

FN27 J.V. Peters and Company, Inc. v. Reilly, No. 1:90 CV 2446, Slip. op. at 15. The court's statement was made in conjunction with the court's ruling that Respondents had been improperly denied a hearing by the Agency's action in deciding the case on the basis of the papers submitted in a motion for an accelerated decision.

FN28 It was made clear to Respondents's counsel that he would not be limited in his cross-examination by his previous cross-examination of witness. Tr. 15, 17.

FN29 One would also think that it would be to a respondent's advantage to know precisely what evidence it will have to meet in

preparing its defense and cross-examination. Obviously, Respondents did not consider this to be to their advantage in this case.

FN30 40 C.F.R. s 22.22(a); Klinestiver v. Drug Enforcement Administration, 606F.2d 1128 (DC Cir.1979). See also Administrative Procedure Act, 5 USC s 556(d), "Any oral or documentary evidence may be received, but the agency shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence."

FN31 Transcript of 1984 hearing (hereafter "1984Tr.") at 39, 329.

FN32 Respondents point to matters that they allege demonstrate that Ms. Becker was biased against Respondents. Initial brief at 19, n. 18. None of the incidents cited, however, indicate that Ms. Becker was not truthful about the violations she observed and reported on her investigation in December 1980. Respondents at the hearing would have been free to question Ms. Becker further about these matters as well as to bring out other matters bearing upon Ms. Becker's credibility, but they did not do so.

FN33 1984 Tr. at 432, 508; Answer of David B. Shillman to Second Amended Complaint, p19, admitting allegations contained in p19 of Complainant's complaint.

FN34 Respondents Initial Brief at 20.

FN35 40 CFR s 22.24.

FN36 Unless otherwise specified, "Complt." refers to the second amended complaint. Purported admissions by Respondent

Shillman in answer to the original complaint are disregarded in view of the finding of the Chief Judicial Officer and the court that the original complaint did not give fair notice to Shillman of his individual liability for the violations.

FN37 Exhibit references are to the Exhibits contained in the record of the 1984 hearing unless otherwise noted.

FN38 The finding that Ms. Brueggemeyer was a shareholder of the corporation is based upon a certified copy in the file of the corporate proceedings (of which RX 11 is a part) listing Dorothy Brueggemeyer as a subscriber to 40 % of the corporate stock. Official notice is taken of this document. See 40 CFR s 22.25(d).

FN39 The regulation requiring a closure plan was published on May 19, 1980, and by statute became effective six months thereafter, or on November 19, 1980. 45 Fed.Reg. 33157, 33242 (May 19, 1980); RCRA, Section 3010, 42 U.S.C. 6930. The closure plan must be submitted to the Regional Administrator at least 180 days before closure is expected to begin. 40 CFR s 112(c) (1980). The EPA interpreted this as requiring a closure plan available for inspection by May 19, 1981. CX 1.

FN40 See letter from Respondents' attorney, writing on behalf of the Corporation, dated April 12, 1984, admitting that the Corporation ceased all operations on the site and abandoned its intention to resume operations. The reference in Mr. English's letter to the EPA expending money to implement the Company's closure plan may refer to the EPA's removal of drums on the site. See 1984Tr. 364.

FN41 It is to be noted that Dr. Homer based his penalty for this alleged violation on the fact that there was no written closure plan at the time of the inspection in December 1980. 1984Tr. 371-372.

FN42 1984Tr. 550-551; Shillman's answer to p2 of the Findings of Facts in the Complaint..

FN43 1984 Tr. 508.

FN44 Cf., Southern Timber Products, on reconsideration, 3 EAD 880, 895 (JO Feb 28, 1992)

FN45 1984Tr. 551.

FN46 40 CFR s 265.1(b).

FN47 45 Fed.Reg. 33169 (May 19, 1980).

FN48 40 CFR s 260.10.

FN49 Ms. Brueggemweyer's liability as a partner under Ohio law has been briefed by Complainant, see Initial Brief on Remand at 27-29. It was also considered by the Chief Judicial Officer in his Final Decision, 3 EAD 280, 295 (CJO August 7, 1990). Respondents have not come forward with any authorities indicating that Complainant's and the Chief Judicial Officer's analysis of the law is incorrect.

FN50 1984Tr. 328-401. If there was any further pertinent testimony of Dr. Homer beyond p. 411, that has not been cited or furnished to me.

FN51 1984Tr. 328-329.

FN52 1984Tr. 329-331.

FN53 1984Tr. 337, 344.

FN54 1984Tr. 345-346, 362-363; CX 8.

FN55 Tr. 48-50.

FN56 1984Tr. 356.

FN57 1984Tr. 345.

0FN58 Unless an Appeal is taken pursuant to 40 CFR s 22.30, or the Environmental Appeals Board elects, sua sponte, to review this order, this decision shall become the final order of the Agency. 40 CFR s 22.27(c). If a motion to reopen the hearing is filed, it must be filed within 20 days after service of the initial decision as provided in 40 CFR s 22.28, and must conform to the requirements stated therein.

1995 WL 442019 (E.P.A.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

J.V. PETERS AND COMPANY, INC., et al.,	)	**FILED**
	)	August 13, 1991
	)	1:23 p.m.
Petitioners,	)	
	)	CASE NO. 1:90 CV 2246
v.	)	
	)	
WILLIAM K. REILLEY, ADM'R, U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,	)	Judge John M. Manos
	)	MEMORANDUM OF OPINION
Respondents.	)	

On August 7, 1990, Chief Judicial Officer ("CJO") Ronald L. McCallum of the United States Environmental Protection Agency ("USEPA") issued a final decision affirming Administrative Law Judge ("AU") Marvin E. Jones' initial order imposing a $25,000 civil penalty against petitioners J.V. Peters and Company, David B. Shillman, and Dorothy L. Bruggemeyer, joint and severally, for alleged violations of the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C.§ 6924. On September 4, 1990, petitioners[1] filed a "Petition for

[1]. Included among the petitioners is J.V. Peters and Company, Inc., an Ohio corporation; however, neither USEPA order (the ALJ's or the CJO's) at issue in this case imposed, or affirmed, civil penalties against it. The court assumes that it is included to avoid a later determination that it waived its rights to contest its liability for

Review of Administrative Findings and Civil Penalty Order" in the United States Court of Appeals for the Sixth Circuit. On December 13, 1990, the court of appeals, upon joint motion of the parties, transferred the case to this court pursuant to 28 U.S.C.§ 1631.[2] For the following reasons, the USEPA's final order is set aside, and the case is remanded to the ALJ to hold an evidentiary hearing at which all petitioners against whom the civil penalty was imposed may be given a fair opportunity to dispute their liability.[3]

I.

J.V. Peters and Company was formed as an Ohio partnership in May 1980 for the purpose of operating a hazardous waste storage and

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violations allegedly committed by other persons or entities related to it.

[2]. Section 1631 provides:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

28 U.S.C.§ 1631.

[3]. Both sides have filed motions for summary judgment. Because this case is being sent back to the ALJ so that an appropriate determination of the facts and law can be made, both motions are denied.

reclamation facility. Its partners were John Vasi and Dorothy L. Bruggemeyer; it employed David B. Shillman to manage the facility.

On December 17, 1980, a representative of the Ohio Environmental Protection Agency conducted an inspection of the premises. Afterward, it sent the partnership an inspection report accusing it of eighteen violations of the RCRA and its implementing regulations. On January 31, 1981, about two weeks after receiving the report, the partnership dissolved and its assets were transferred to J.V. Peters and Company, Inc., an Ohio corporation. The corporation, with Shillman as president and chairman of the board and Bruggemeyer as secretary and treasurer, continued to operate the hazardous waste facility previously operated by the partnership.

On April 17, 1981, the USEPA initiated an administrative complaint against J.V. Peters and Company, Inc., and imposed a $25,000 civil penalty against it for the violations found at the hazardous waste facility in December 1980.[4] No other parties were named as

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[4]. Administrative complaints alleging violations of the RCRA are defined in the United States Code as "compliance orders." They are filed pursuant to 42 U.S.C. § 6928(a), which, at the time of the complaint, provided in pertinent part:

> (Wlhenever on the basis of any information the Administrator determines that any person is in violation of any requirement of this subchapter, the Administrator may issue an order requiring compliance immediately or within a specified time period or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.
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> . . . .

respondents. On May 12, 1981, Shillman answered the complaint in his capacity as the corporation's president. In his answer, he admitted to some of the violations, denied others, and challenged the validity of the civil penalty. The case was assigned to ALJ Marvin E. Jones. At a later settlement conference, Shillman advised the USEPA that the corporation was not a Proper party in interest because it did not exist on December 17, 1980, the day on which the violations allegedly occurred. On September 20, 1983, having taken no furth~r action to prosecute the case, the USEPA filed with the ALJ a "Motion for Leave to Withdraw Administrative Complaint" without prejudice. The motion was granted.

On February 2, 1984, the USEPA filed a new complaint, captioned "First Amended Complaint," alleging the same violations set forth in the 1981 complaint and imposing the same $25,000 civil penalty. Again, only the corporation was named as a respondent. The corporation filed an answer denying the allegations and again it raised the defense that it was not in existence on December 17, 1980. The matter was then set for a hearing before the ALJ pursuant to 42 U.S.C.§ 6928(b).[5]

> If such violator fails to take corrective action within the time specified in the order, he shall be liable for a civil penalty of not more than $25,000 for each day of continued noncompliance and the Administrator may suspend or revoke any permit issued to tne violator (whether issued by the Administrator or the State).

42 U.S.C. § 6928(a)(1), (3).

[5]. At the time, section 6928(b) provided:

> Any order shall become final unless, no later than thirty days after the order is served, the person or persons named therein request a public hearing. Upon such request the Administrator shall promptly conduct a public hearing. In connection with any

The hearing began on October 23, 1984. At the close of the USEPA's evidence, the corporation moved to dismiss the complaint on the ground that it could not be held liable for events which occurred prior to the date of its incorporation. In Opposition, The USEPA argued that the corporation had waived this defense by not attacking USEPA's assertion of personal jurisdiction over it, and that the corporation could be held liable for the partnership's violations because the two entities were so interrelated as to be part of a "seamless web." The ALJ denied the corporation's motion; however, he directed the parties to file post-hearing briefs on whether Shillman and/or the partnership could be held responsible for the civil penalty assessed against the corporation. Afterward, the corporation put on its case, which consisted primarily of Shillman's testimony on the nature and the extent of the violations occurring in December 1980 and the relationship between the Partnership, the corporation, and the individuals involved with each.

In April 1985, over five months after the hearing, the USEPA moved to amend its complaint to add the partnership and Shillman as respondents; Bruggemeyer was not named. The ALJ never ruled on the motion; instead, on May 15, 1985, he issued an "initial decision" finding the corporation, the partnership, and Shillman jointly and severally liable for the $25,000 civil penalty. All three respondents appealed the ALJ's decision to the USEPA Administrator. The matter was then referred to its CJO.

> proceeding under this section the Administrator may issue subpenas (sic] for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and may promulgate rules for discovery procedures.

42 U.S.C. § 6928(b).

On May 9, 1986, the CJO issued an order reversing the ALJ's decision on the ground that the partnership and Shillman were prejudiced by being denied fair notice of their potential liability for the penalty assessed against the corporation and by being denied an opportunity to contest that liability. Specifically, the CJO's order held:

> Here . . . it is apparent that the issue of the potential liability of Shillman and the partnership was not tried at the hearing in October 1984. The case presented by Complainant in no way purported to establish liability on the part of Shillman and the partnership(.] Because Complainant's case was not directed at the issue of Shillman and the partnership's liability, Shillman's subsequent testimony, which in some respects tended to be self-incriminating, has to be discounted. In short, Complainant's presentation did not join the issue for. trial or otherwise give notice to the unnamed parties of their potential party status.
>
> Complainant's motion to amend, five months after the hearing, was clearly prejudicial to the ability of the unnamed parties to mount a defense. First, it is by no means certain that the corporation is the proper party to defend the interests of Shillman and the partnership.
>
> . . . Second, it is reasonable to assume that a fair trial of the issue would have given the unnamed parties an opportunity to present evidence at the hearing to contest responsibility for the violations and an

> opportunity for Shillman to substantiate his claim that he was not a member of the partnership.

In re: J.V. Peters & Company. Inc., App. No. 85-4 at 9-11 (USEPA May 9, 1985) (footnote omitted).

> Thus, despite ample knowledge and opportunity throughout these proceedings, fair notice comporting with Federal notions of due process was never given to the unnamed parties as to their potential liability, nor has Complainant offered any excuse for the untimeliness of its written Motion to Amend.

Id. at 13.

The CJO's order concluded with a finding that the unnamed parties should have been given a hearing to present evidence before being subject to liability for the civil penalty:

> In the case sub judice, Shillman participated as a witness in the defense of the corporation. However, this fact, either alone or in conjunction with findings purporting to identify Shillman as the real party in interest, does not justify holding Shillman liable without first filing charges against him and giving him an opportunity to answer these charges, including the right to present evidence at a hearing to refute the charges that he is in fact the real party in interest . . . I am persuaded that Shillman and the partnership are entitled to nothing less.

Id. at 15.

The CJO then remanded the case "to allow (the USEPA] to amend its complaint, if it so wishes, and to allow the case to proceed in a manner consistent with this opinion." Id. at 16. In June 1986, the USEPA filed a "Motion for Reconsideration" of the CJO's remand order; respondents filed a "Memorandum in Opposition" shortly thereafter. On October 23, 1986, the CJO denied the USEPA's motion and the case was sent back to the ALJ.

On December 17, 1986, the ALJ issued an order requiring USEPA's counsel to

> advise on or before December 26, 1986, how Complainant will proceed with the instant case "in a manner consistent with" the (CJO's] opinion by advising which, if any, of the options suggested in said opinion he will pursue.

In re: J.V. Peters & Com~anv. Inc., App. No. 85-4 (USEPA Dec. 17, 1986) (insert added).

Eight months later, having received no response from the USEPA, the ALJ dismissed the case with prejudice on the ground that the USEPA was in default for failing to comply with his December 17th order. On September 10, 1987, the USEPA moved for relief from the default order and sought leave to file a "Second Amended Complaint." On October 16, 1987, the ALJ issued an order granting USEPA's motion for relief from default; it was then allowed to file a "Second Amended Complaint." In re: J.V. Peters & Company,. Inc., App. No.

85-4 (USEPA Oct. 16, 1987). The complaint named the corporation, the partnership, Shillman, Bruggemeyer, and Vasi as respondents.

On December 3, 1987, all respondents, except Vasi, filed separate answers[6] denying the violations and the assessment of a civil penalty. Once more, the corporation raised the defense that it did not exist in December 1980; the other answering respondents asserted, inter alia, that the USEPA's claims against them were time-barred under 28 U.S.C. § 2462. Section 2462 provides:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. 5 2462.

On April 13, 1988, the USEPA moved for an "accelerated decision" against each of the respondents on the ground that the testimony and evidence adduced at the October 1984 hearing established that all of them were liable for the December 1980

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[6]. Because Vasi never answered the Second Amended- Complaint, the ALJ found him to be in default and that ~he admitted all of the allegations raised against him. Vasi did not appeal this decision.

violations. An accelerated decision is provided for in 40 C.F.R. § 22.20:

> The Presiding Officer (AUJ], upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding[.]

40 C.F.R. § 22.20(a) (insert added). On June 3, 1988, respondents opposed the motion.

On September 30, 1988, the ALJ issued an initial decision granting USEPA's motion for accelerated decision based upon the facts developed at the October 1984 hearing and the respondents' opposition briefs to the motion. He found Shillman, Bruggemeyer, Vasi, and the partnership, but not the corporation, liable for the $25,000 civil penalty assessed in the complaint. He also rejected respondents' statute of limitations argument on the ground that it did not apply to this action because the $25,000 assessment was more in the nature of a remedial administrative sanction to ensure compliance with the RCRA than a penal sanction for violating the Act. In support of this finding, the ALJ relied upon United States v. Davi[o], 136 Fed. Supp. 423 (E.D. Mich. 1955) for the proposition that, as a general rule, statutes of limitation do not run against the United States, and that section 2462 should be narrowly construed so as not to apply to "civil damages" or other "remedial" damage assessments.

On October 24, 1988, Shillman, Bruggemeyer, and the partnership appealed to the USEPA Administrator seeking to reverse the ALJ's decision. The USEPA filed its brief in opposition on November 24, 1988. On August 7, 1990, the USEPA's CJO issued his final decision affirming the ALJ's granting of an accelerated decision in favor of the USEPA. He also found that the action was filed timely under the "relation back" doctrine of Fed. H. Civ. P. 15(c) .[7]

On September 4, 1990, Shillman, Bruggemeyer, and the partnership appealed the CJO's final decision to the United States Court of Appeals for the Sixth Circuit under the appeal provisions of the Administrative Procedure Act, 5 U.S.C. §§ 704, 706. On December 13, 1990, the case was transferred to this court pursuant to 28 U.S.C. § 1631. See supra note 2.

II.

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[7]. The CJO did not clearly state whether he affirmed the ALJ's decision that section 2462 did not apply, or whether he found the action was filed timely for an alternative reason. Specifically, he held: "Assuming that § 2462 applies to this proceeding, I conclude that this action is not time-barred because the Second Amended Complaint is based upon the same cause of action as the First Amended Complaint, and therefore 'relates back' to the First Amended Complaint." The reasoning behind this decision was that: (1) the basic claim arose out of the same conduct set forth in the original pleading; (2) the parties brought in had sufficient notice of the potential claims against them so that they would not be prejudiced by now having to maintain a defense; (3) that the new parties knew or should have known that but for a mistake concerning the identity of the real parties in interest, the action would have been brought against them; and (4) that the second and third requirements were met within the applicable statute of limitations. See Schiavone v. Fortune, 477 U.S. 21, 29, 106 S. Ct. 2379, 2384 (1986).

Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706, provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and dtatutory provisions, and determine the meaning or applicability of the terms of agency action. The reviewing court shall –
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> . . . .
>
> (2) hold unlawful and set aside agency action, findings and conclusions found to be –
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> (B) contrary to constitutional right, power, privilege, or immunity;
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> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and

> 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706.

A.

Applying the above standards, the court affirms the CJO's decision on the statute of limitations issue. As noted by the CJO at page 9 of his final order, the USEPA's procedural rules do not specirically include a "relation back" doctrine; however, the CJO may use his discretion to resolve procedural questions not specifically addressed by the rules. Courts have recognized that agencies are free to fashion their own rules of procedure, so long as those rules satisfy the fundamental requirements of fairness and notice." Katson Bros., Inc. v. USEPA, 839 F.2d 1396, 1399 (10th Cir. 1988); Turner v. Merit Svtems Protection Bd., 806 F.2d 241, 245 (Fed. Cir. 1986). Here, the CJO's application of Fed. R. Civ. P. 15(c) satisfies this test. Rule 15(c) is an established rule of federal practice; its proper application is consistent with fundamental concepts of fairness and notice. Moreover, the rule was applied in a reasonably fair manner by the CJO in this case: it is not

disputed that the claim arose out of the conduct set forth in the first amended complaint; the additional parties, Shillman, Bruggemeyer, and the partnership, had sufficient notice of the USEPA action before April 1985 that they could properly maintain a defense; and they should have been aware by April 1985 that, notwithstanding the fact that the USEPA brought its action against the corporation, that they could be potentially liable for the violations. See supra note 7.

Because the court finds that the CJO's rejection of respondents' time—bar arguments was neither arbitrary and capricious, nor an abuse of discretion, nor in violation of law, and that his decision was supported by substantial evidence, his ruling on this issue is affirmed.

B.

However, the CJO's decision to affirm the ALJ's granting of an accelerated decision to the USEPA was arbitrary and capricious, and in violation of law. Acc'ordingly, it must be set aside. The decision was arbitrary and capricious in that it affirmed the ALJ's denial of a hearing to the respondents even though his May 9. 1986 remand order directing the ALJ to "proceed in a manner consistent with this opinion" clearly stated that Shillman and the partnership were denied due Process by being held liable for a civil penalty without being given the opportunity to Present evidence at a hearing. The May 9th order also states that Shillman's testimony developed at the October 1984 hearing, wherein he was participating as a witness solely in defense of the corporation, "does not justify holding [him] liable without first filing charges against him and giving him an opportunity to answer [the] charges, including the right to present evidence at a hearing to refute the charges that he is in fact (a] real party in interest." In re: J.V. Peters & Co.. Inc., App. No. 85-4 at 15 (USEPA May 9, 1985). Even if it could be argued that

Shillman, by entering an appearance at the October 1984 hearing, had the capacity to assert his own interests along with the interests of the corporation, it cannot be argued that he could assert the rights of Bzuggemeyer or the partnership, of which he was not a member. It is clear that the ALJ did not "proceed in a manner consistent with [the CJO's remand orderi." The CJO ruled arbitrarily and capriciouly in affirming the ALJ's decision to deny respondents the rights that he previously found they were entitled to under his May 9th remand order and due process.

The CJO's affirmance also was in violation of law. The ALJ's decision to grant the motion for accelerated decision denied respondents their absolute right to present evidence at a public hearing to contest their liability. Section 6928 of Title 42 of the United States Code provides, in pertinent part:

> Any order issued under this subsection shall become final unless, no later than thirty days after the order is served, the person or persons named therein request a public hearing. UPon such reauest. the Administrator shall conduct a public hearing. In connection with any proceeding under this section, the Administrator may issue subpenas [sic] for attendance and testimony of witnesses and the production of relevant papers, books, and documents, and may promulgate rules for discovery procedures.

42 U.S.C. § 6928 (emphasis added).

Under the statute, it is stated that the Administrator, and by delegation of authority, the ALJ, shall conduct a public hearing upon

respondents' request. The statute does not allow the ALJ discretion to deny the hearing for any reason, not even if he believes that there are no factual issues to resolve.

In his final order affirming the ALJ's decision that no hearing was required, the CJO cites the case of United States v. Cheramie Bo-Truc #5,. Inc., 538 F.2d 696 (5th Cir. 1976) for the proposition that "[e]ven when a statute mandates a hearing, neither that statute, due process nor the Administrative Procedure Act require an agency to conduct a meaningless evidentiary hearing when the facts are undisputed." In re: J.V. Peters & Co., Inc., App. No. 88-3 at 19 (USEPA Aug. 7, 1990) (citing Cheramie Bo—Truc, 538 F. 2d at 698). However, an examination of the Cheramie Bo-Truc decision discloses that this proposition was specifically rejected in cases such as the one now before the court wherein the statute providing for a hearing allows for that hearing unconditionally:

> The government further insists that although the APA requires the holding of an administrative hearing in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, 5 U.S.C.§ 554 (1970), no hearing was required because no facts were in dispute. We disagree. A long line of cases establishes the rule that even when a statute mandates an adjudicatory proceeding, neither that statute, nor due process, nor the APA requires an agency to conduct a meaningless evidentiary hearing when the facts are undisputed. But all these cases concern either statutes that do not clearly require a hearing before the agency action in cuestion, statutes whose wording and legislative

> history condition a hearing on a ~re l iminarv showing of a disputed issue of fact, or at minimum agencies that have exercised their rulemaking powers to establish statutorily-permitted threshold Prerecuisites to a hearing. We refuse to extend their rule to this case, one where the agency summarily disregarded a controlling statute that clearly mandates a hearing.

Cheramie Bo-Truc, 538 F.2d at 698-99 (emphasis added) (citations omitted).

Here, the statute involved, 42 U.S.C.§ 6928(b) clearly and unconditionally mandates a hearing wherein each of the respondents, none of whom were represented at the October 1984 hearing, are given the opportunity to present evidence in their own defense. The text of the statute and due process require nothing less.

III.

Accordingly, the final decision of the CJO issued on August 7, 1990 is set aside, and the case is ordered remanded to the ALJ to conduct an evidentiary hearing on respondents' potential liability for the $25,000 civil penalty assessed against them in the USEPA's Second Amended Complaint.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

J.V. PETERS AND COMPANY, INC., et al.,	)	CASE NO. 1:90 CV 2246
Petitioners,	)	Judge John M. Manos
v.	)	
WILLIAM K. REILLEY, ADM'R, U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,	)	
Respondents.	)	ORDER

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, the final decision of the United States Environmental Protection Agency's Chief Judicial Officer, issued August 7, 1990, affirming the Administrative Law Judge's granting of an accelerated decision to respondent United States Environmental Protection Agency is set aside, and the case is ordered remanded to the Administrative Law Judge to conduct an evidentiary hearing wherein petitioners David B. Shillman, Dorothy L. Bruggemeyer, and J.V. Peters and Company are given an opportunity to present evidence to contest their liability for the $25,000 civil fine assessed against them in

the United States Environmental Protection Agency's Second Amended Complaint.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE

United States Court of Appeals, Sixth Circuit.

J.V. PETERS AND COMPANY, INC., an Ohio Corporation,
J.V. Peters and Company, a Partnership,
David B. Shillman, Dorothy L. Bruggemeyer, Petitioners,
v.
William K. REILLY, Administrator; United States Environmental Protection
Agency, Respondents.

No. 90-3762.

Dec. 13, 1990.

EPA, No. RCRA 88-3.

EPA

TRANSFERRED.

Before RYAN and ALAN E. NORRIS, Circuit Judges, and JOINER, Senior District Judge [FN*].

ORDER

**1 The petitioners brought this petition for review of a final decision of the U.S. Environmental Protection Agency imposing civil penalties for violations of Section 3004 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6924, and implementing regulations. The petitioners and the respondent now jointly move that this case be transferred to the district court for the Northern District of Ohio,

Eastern Division, where jurisdiction for the review of final agency action is proper under the Administrative Procedure Act, 5 U.S.C. §§ 702-06 and 28 U.S.C. § 1331. Upon consideration, we conclude transfer is appropriate. 28 U.S.C. § 1631.

FN* The Honorable Charles W. Joiner, Senior U.S. District Judge for the Eastern District of Michigan, sitting by designation.

Before the United States Environmental Protection Agency
Environmental Appeals Board

IN THE MATTER OF J.V. PETERS & COMPANY, INC. ET AL.,
RESPONDENTS

Resource Conservation and Recovery Act

RCRA Docket No. V-W-81-R-75
RCRA Appeal No. 88-3
August 7, 1990

FINAL DECISION

The U.S. Environmental Protection Agency, Region 5 ("Complainant") initiated this action alleging that J.V. Peters & Company, Inc. violated Section 3004 of the Resource Conservation and Recovery Act (RCRA) of 1976, as amended, 42 U.S.C. s6924, and its implementing regulations. Pursuant to a remand order from the Chief Judicial Officer, Complainant amended its complaint to include Respondents J.V. Peters & Company, David B. Shillman and Dorothy L. Brueggemeyer. I am affirming the Presiding Officer's decision that the violations occurred and that the Respondents are jointly and severally liable for a civil penalty in the sum of $25,000.00.

On Appeal, Respondents argue that this action is barred by the five year statute of limitations provided in 28 U.S.C. s2462. Alternatively, Respondents argue that the Presiding Officer violated their due process rights by denying them a hearing and by relying upon findings made prior to the Chief Judicial Officer's remand order.

Respondents also maintain that the Complainant was not entitled to an accelerated decision.

I.

In May 1980, David B. Shillman decided to enter the industrial waste hardling business. To that end, Dorothy L. Brueggemeyer (Shillman's wife) and John Vasi formed a partnership, J.V. Peters & Company (the "Partnership"). Brueggemeyer, who had no previous connection with the hazardous waste business, provided the entire capitalization of $25,000 for the Partnership. On or around June 1, 1980, the Partnership began operating a hazardous waste facility on Middlefield, Ohio property leased by Shillman. The business of the Partnership consisted of transporting and collecting industrial solvents and storing them in either bulk or drum storage until sold to a user or reclaimant. Shillman was the manager of the facility and exercised complete authority over the operations. [FN1]

Complainant inspected the site in December 1980 and found numerous violations of RCRA and its implementing regulations. [FN2] Approximately two weeks after receiving a copy of the inspection report, the Partnership dissolved, transferring all of its assets and liabilities to J.V. Peters & Company, Inc., an Ohio corporation (the "Corporation"). The business of the Corporation was the same as the business of the Partnership. The directors of the Corporation held their initial meeting on February 2, 1981, and elected Shillman chairman of the board and president of the Corporation. Brueggemeyer, one of the Corporation's three shareholders, was elected as a director, secretary, and treasurer of the Corporation.

On April 17, 1981 Complainant initiated this action. The Corporation was the only named respondent. On May 12, 1981 Shillman filed an answer on behalf of the Corporation admitting to most of the violations.

Early in 1984, Complainant filed its First Amended Complaint, again naming only the Corporation as the respondent. At the hearing held in October 1984, the Corporation moved to dismiss the action on the grounds that the Corporation did not exist on the date of the alleged violations. The Presiding Officer denied this motion, and directed the parties to address in their post- hearing briefs whether Shillman and/or the Partnership could be held responsible for the violations, despite the fact that the Corporation was the only named respondent. The Corporation then presented its case, which consisted only of Shillman's testimony. Shillman testified as to the nature and extent of the violations, and also as to the relationship between the Corporation and the Partnership and the people involved in those organizations.

In April 1985 Complainant filed a motion to amend its complaint to add Shillman and the Partnership as respondents. This motion was never decided, as one month later the Presiding Officer rendered his initial decision, holding the Corporation, the Partnership and Shillman jointly and severally liable for the violations and assessing a civil penalty of $25,000. The Presiding Officer determined that it was unnecessary to rule on the motion as Shillman, through his overall managerial responsibility for the facility and his active participation in the Corporation's defense, had in effect entered his appearance in the action, and because Ohio law warranted disregarding the corporate status of the Corporation and finding the Partnership liable. See Initial Decision, May 15, 1985, pp.28-31.

Upon Appeal to the Chief Judicial Officer, the Partnership and Shillman argued that because they had not been named in the First Amended Complaint as respondents and served with process, the Presiding Officer erred in finding them liable for the violations. In May 1986 the Chief Judicial Officer agreed, and vacated the initial decision. According to the Chief Judicial Officer,

> [I]t is reasonable to assume that a fair trial of the issue would have given the unnamed parties an opportunity to present evidence at the hearing to contest responsibility for the violations and an opportunity for Shillman to substantiate his claim that he was not a member of the partnership.

Remand Order, p.11. Therefore, the Chief Judicial Officer remanded the case to allow Complainant to amend its complaint and for further proceedings to determine who was responsible for the violations. [FN3]

Complainant filed a Second Amended Complaint on November 16, 1987. Unlike its predecessor, the Second Amended Complaint named as respondents the Corporation, the Partnership, Shillman, Brueggemeyer and Vasi. The allegations in the Second Amended Complaint were based upon the findings in the May 1985 Initial Decision. All respondents but Vasi filed an answer to the Second Amended Complaint, [FN4] denying the existence of the violations. In addition, Respondents asserted as an affirmative defense the five year statute of limitations in 28 U.S.C. s2462.

Complainant filed a motion for an accelerated decision pursuant to 40 CFR s22.20, which provides that if there are no issues of material fact, a Presiding Officer may render a decision without a

hearing if the moving party is entitled to judgment as a matter of law. Complainant argued that the undisputed facts contained in the pre-remand record demonstrated Respondents' liability, and were binding upon Respondents.

Respondents did not offer any facts or evidence to refute those portions of the record relied upon by Complainant in its motion. Instead, Respondents argued that under the requirements of due process and the Remand Order, they were not bound by findings made in a proceeding to which they were not parties. Respondents also argued that these claims were barred under 28 U.S.C. s2462, which provides a five year statute of limitations for proceedings by the United States to enforce any civil fine, penalty or forfeiture.

The Presiding Officer granted Complainant's motion for an accelerated decision in September 1988. The Presiding Officer determined that:

> [The Remand Order did] not disturb the findings set forth in the Initial Decision that the subject violations occurred; but it does require the case to proceed to establish which, if any, of the Respondents, now named in said Second Amended Complaint, are responsible for said violations for which a civil penalty in the total sum of $25,000.00 has been found to be appropriate.

Initial Decision (Order on Remand), September 26, 1988, p.3. Consequently, the Presiding Officer did not re-examine his previous findings that the alleged violations occurred, and instead addressed only whether the Respondents could be held liable for that penalty. Relying

upon the record established prior to the Remand Order and upon the answers to the Second Amended Complaint, the Presiding Officer concluded that Shillman was the "operator" of the facility, [FN5] and thus could be held liable. [FN6] The Presiding Officer also found that Brueggemeyer and Vasi were partners in the Partnership, [FN7] and that the partners, as owners of the facility, could be held liable. [FN8] Shillman, Brueggemeyer and Vasi were held to be jointly and severally liable for the $25,000 civil penalty. The Corporation, however, was not found liable, as it did not exist on the date of the violations. In addition, the Presiding Officer rejected the Respondents' argument that the five year statute of limitations in 28 U.S.C. s2462 applied to this action.

Respondents have Appealed the Presiding Officer's September 1988 Initial Decision. Preliminarily, Respondents assert that 28, U.S.C. s2462 bars this action. In addition, Respondents contend that the Presiding Officer improperly construed the mandate of the Remand Order. Respondents also maintain that the Presiding Officer violated their due process rights by denying them a hearing to which they were entitled. Respondents argue that the findings made by the Presiding Officer prior to the remand order can not be binding upon them as they were not parties to the proceeding at the time the findings were made. Finally, Respondents argue that Complainant was not entitled to an accelerated decision because of factual issues raised by Respondents' answers to the Second Amended Complaint, and because Complainant was not entitled to judgment as a matter of law.

II.

Respondents argue that the five year statute of limitations provided in 28 U.S.C. s2462 bars this action because the violations occurred in December 1980, and the Second Amended Complaint was

not filed until November 1987. Assuming that s2462 applies to this proceeding, [FN9] I conclude that this action is not barred, because the Second Amended Complaint is based upon the same cause of action as the First Amended Compliant, and therefore "relates back" to the First Amended Complaint.

The "relation back" rule allows a plaintiff to amend its complaint after the limitations period has expired if the amendment does not state a cause of action different than the one(s) in the original complaint. Courts adopted the relation back rule to avoid the harsh effects of a statute of limitations when an amendment to the complaint would not frustrate the purpose of the statute, which is to protect defendants from stale claims. Union Pacific Railway Co. v. Wyler, 158 U.S. 285, 296-298 (1895). Eventually this rule was codified in Rule 15(c) of the Federal Rules of Civil Procedure.

There is no similar rule in the Consolidated Rules of Procedure, 40 CFR Part 22, which apply to this proceeding. Although 40 CFR s22.14 provides for the amendment of complaints, it differs from its federal counterpart in that it is silent as to relation back, even though the considerations underlying the relation back rule are also present in agency adjudications. In these circumstances, I adopt the relation back rule, [FN10] and look to federal Rule 15(c) for guidance.

Rule 15(c) provides in pertinent part:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An

> amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

This rule is to be liberally construed. Hampton v. Hanrahan, 522 F. Supp. 140, 143 (N.D. Ill. 1981).

An amended complaint relates back to the original pleading when each of the following four factors has been satisfied:

> (1) the basic claim must have arisen out of the conduct set forth in the original pleading;
> (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense;
> (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and
> (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

Schiavone v. Fortune, 477 U.S. 21, 29 (1986). The facts alleged in the Second Amended Complaint derive from the findings of fact in the

Presiding Officer's May 1985 Initial Decision, and thus the first of the four factors is satisfied. At issue are the other requirements.

The second and fourth Schiavone factors require that Respondents, as the parties to be brought in, must have received such notice of the action's commencement within the prescribed limitations period that they would not be prejudiced in maintaining their defense. Rule 15(c) does not require actual notice. Berndt v. State of Tennessee, 796 F.2d 879, 884 (6th Cir. 1986). Notice may be established constructively when there is an "identity of interests" such that it is fair to impute notice to the newly named party. Garcia Andino v. Alcan Aluminio Do Brasil, S.A., 652 F. Supp. 415, 419 (D. P.R. 1987). An identity of interests exists "when the original and added parties are so closely related in business or other activities that it is fair to presume the added parties learned of the institution of the action shortly after it was commenced." Id.

The record amply demonstrates an identity of interests between the Corporation and Respondents. An identity of interests typically exists between past and present forms of the same enterprise, or between related business organizations whose officers, directors and/or shareholders are substantially identical and who have similar names or conduct their businesses from the same office. 6A, Wright, Miller & Kane, Federal Practice and Procedure s1499, pp. 149-150 (1990). The Corporation and the Partnership meet this test. The entities names are identical except for the "Inc." in the corporate name. Both entities conducted the same business at the same location under the day-to-day control of the same individual, Shillman. Brueggemeyer was a major investor in each entity.

An identity of interests can also exist between organizations and individuals. For example, in Seber v. Daniels Transfer Co., 618 F. Supp. 1311 (W.D. Pa. 1983), the original defendant was Daniels Transfer Co., a closely held corporation. The amended complaint, which added as defendants the sole owner of the corporation and the chief operating officer who ran the day-to-day operations of the business, related back to the original complaint due to the close relationship between the corporation and the individuals to be added as defendants. Likewise, in Fluker v. Kenney's Franchise Corp., 685 F. Supp. 591 (W.D. Va. 1988), notice was imputed to the newly named defendant who, as the dominant shareholder of the corporate defendant, actively participated in the previous proceedings. A plaintiff corporation was permitted to amend its complaint under Rule 15(c) to add its affiliated partnership which was the proper party in the case. Raynor Brothers v. American Cyanimid Co., 695 F.2d 382 (9th Cir. 1982). In Raynor Brothers, the major shareholder of the original plaintiff was one of the partners in the substituted plaintiff, and therefore the identity of interests test was met.

Considering these examples, the Corporation shared an identity of interests with Shillman and Brueggemeyer. As between the Corporation and Shillman, Shillman admittedly controlled the day-to-day activities of the Corporation. Shillman was president and chairman of the board of directors of the Corporation. Moreover, Shillman actively participated in the pre-remand proceedings on behalf of the Corporation. As between the Corporation and Brueggemeyer, Brueggemeyer was one of the three shareholders in the Corporation, and was previously a partner in the Partnership. Moreover, Brueggemeyer was secretary, treasurer and a director of the Corporation.

Another circumstance whichtends to establish an identity of interests is a common attorney. Notice can be imputed to a new defendant who is represented by the attorney who also represented the original defendant. Kirk v. Cronvich, 629 F.2d 404, 408 (5th Cir. 1980); Franklin v. Norfolk & Western Railway Co., 694 F. Supp. 196, 198 (S.D. W.Va. 1988); Seber, 618 F. Supp. at 1314. In this case, the Corporation and Respondents have been represented by the same attorney in this action and in other related actions arising out of the hazardous waste business activities of the Corporation and Partnership. [FN11]

Each of the Respondents is so closely related to the business activities of the Corporation that it is fair to presume that they learned of this action shortly after it was initiated, and in any event prior to the expiration of a five year statute of limitations. The likelihood that this presumption is true is enhanced by the fact that Respondents and the Corporation have shared a common attorney in this and other litigation arising out of their hazardous waste disposal business. [FN12]

Furthermore, Respondents received notice such that they were not prejudiced in maintaining a defense. Usually, when the original defendant and the added defendants have an identity of interests, relation back is not prejudicial to the new defendants. Raynor Brothers, 695 F.2d at 384; Seber, 618 F. Supp. at 1313; Hampton, 522 F. Supp. at 144. Considering the close identity between the Corporation and Respondents, Respondents received sufficient notice. Moreover, there has been no loss of evidence or other undue surprise, as Respondents are represented by the attorney who has represented the Corporation throughout these proceedings.

The third and fourth Schiavone factors require that Respondents knew or should have known within the prescribed limitations period that they would have been named as respondents but for a mistake. "[A]n identity of interests with an erroneously named defendant suffices to charge that a proper defendant with notice of the suit reasonably should know that but for a mistake as to the identity of the proper defendant the action would have been brought against it." Ringrose v. Engelberg Huller Co., Inc., 692 F.2d 403, 411 (6th Cir. 1982)(Jones, J., concurring). The close identity of interests between the Corporation and Respondents amply supports the conclusion that Respondents knew prior to December 1985 that the action should have been brought against them.

Specifically, it is hard to believe that the Respondents were unaware that the Corporation did not exist on the date of the alleged violations, even though the Corporation did not raise this defense until the October 1984 hearing. By asserting this defense, the Corporation and Respondents implicitly understood that the Partnership, which owned the hazardous waste facility at that time, could be liable for the alleged violations. As stated in the Remand Order, "Shillman and the [P]artnership should have been aware of their potential party status throughout these proceedings." Remand Order, p.7. That Shillman and other individuals could be held liable was made clear at the hearing by the Presiding Officer's direction to the Corporation to brief whether the Partnership and Shillman could be held liable, and in April 1985, following the hearing, when Complainant moved to amend the complaint to conform to the evidence by adding the Partnership and Shillman as respondents. [FN13]

The record, however, also provides substantial evidence that even though Complainant's motion to amend was not filed until April

1985, Complainant was informed relatively early in the limitations period that the Corporation did not exist on the date of the alleged violations. Deliberate, tactical choices or laziness of a plaintiff can give an unnamed defendant reason to believe that there is a reason other than mistake for the plaintiff's failure to sue him. [FN14] This reasoning, however, has not been applied in cases like this one, where the motion to amend the complaint was filed prior to the expiration of the limitations period. [FN15] When the motion to amend has been timely filed, relation back is allowed.

Complainant was required to seek leave of the Presiding Officer in order to amend the complaint, 40 CFR s22.14(d), and had no control over if and when the motion would be granted. In fact, the Presiding Officer did not rule on the motion prior to rendering his initial decision. Complainant sought leave within the limitations period, and this motion was in effect granted by the Remand Order after the limitations period expired. Under these circumstances, it would not be in the best interests of justice to find that the Second Amended Complaint does not relate back to Complainant's April 1985 motion to amend the complaint. Chaddock v. Johns-Manville Sales Corp., 577 F. Supp. 937, 939- 940 (S.D. Ohio 1984). [FN16]

III.

According to Respondents, the Remand Order requires that they have an opportunity to refute all of the allegations in the Second Amended Complaint. Respondents contend that the Presiding Officer erroneously construed the Remand Order as requiring only a determination of whether Respondents could be liable for the $25,000 penalty. Respondents' argument is not supported by the language of the Remand Order.

Although the May 1985 Initial Decision was vacated because the unnamed parties did not have an "opportunity to present evidence at the hearing to contest responsibility for the violations and an opportunity for Shillman to substantiate his claim that he was not a member of the [P]artnership[,]" the Remand Order did not direct the Presiding Officer to hold an evidentiary hearing regardless of the circumstances. Remand Order, p.5. The Remand Order was less specific. It clearly stated that "further proceedings will be necessary to determine if any of the three [the Partnership, the Corporation and Shillman] can or should be held liable for the penalty." Remand Order, p.7 (emphasis added). This language did not signify a need to redetermine whether any violations had occurred. Thus, the Presiding Officer correctly stated that "[t]o decide issues other than determining the parties responsible for subject violations is beyond the scope of the Order of Remand, which orders that the person or persons responsible for the violations should be identified." Initial Decision (Order on Remand), September 26, 1988, p.8.

Respondents also assert a due process right to a "meaningful hearing to challenge any and all evidence which may exist in support of Complainant's claim." Respondents' Brief, p.1. Respondents aver that they are entitled to a hearing on all of the allegations in the Second Amended Complaint.

Even when a statute mandates a hearing [FN17] neither that statute, due process nor the Administrative Procedure Act [FN18] require an agency to conduct a meaningless evidentiary hearing when the facts are undisputed. United States v. Cheramie Bo-Truc #5, Inc., 538 F.2d 696, 698 (5th Cir. 1976). This principle is incorporated in 40 CFR s22.20, which allows accelerated decisions if there are no genuine

issues of material fact and the moving party is entitled to judgment as a matter of law.

Complainant move for an accelerated decision on the Second Amended Complaint, arguing that the pre-remand record demonstrated that there were no genuine issues of material fact, and that it was entitled to judgment as a matter of law. Use of the pre-remand record is clearly permissible for this purpose. Under the rules, 40 CFR s22.20(a), the moving party may rely upon "additional evidence, such as affidavits" to support a motion for accelerated decision. The pre-remand record constituted additional evidence for the purposes of the rule. In responding to Complainant's motion, Respondents therefore had the procedural opportunity to establish their entitlement to a hearing by demonstrating an issue of material fact. [FN19] Respondents did not take advantage of this procedural opportunity, and instead failed to present any evidence demonstrating a factual issue as to any of the allegations in the Second Amended Complaint, including those pertaining to the only issue to be decided on remand.

Specifically, Respondents failed to produce anyevidence entitling them to a hearing on the issue of their responsibility. For example, the Partnership could have submitted an affidavit or other documents showing that it did not own the hazardous waste business on the date of the alleged violations. Likewise, Brueggemeyer could have filed an affidavit supporting her assertion that she was not a member of the Partnership on that date. Although Shillman cannot now demand a hearing to testify differently than he did before, he could have presented evidence to shed a different light on his previous testimony thereby demonstrating his lack of legal responsibility for the violations. Respondents cannot now argue that the process afforded to them was inadequate and thus violated their due process rights when they failed

to take advantage of the opportunity to refute Complainant's evidence and demonstrate their entitlement to a hearing. United States v. Charles George Trucking Co., Inc., 642 F. Supp. 329, 334 (D. Mass. 1986).

Respondents also aver that because they were not parties to this proceeding prior to the Remand Order, the guarantees of due process preclude binding them to the findings contained in the May 1985 Initial Decision. Respondents' liability, however, was not based upon the pre-remand record alone. The Presiding Officer also relied upon Respondents answers to the Second Amended Complaint, noting that the admissions of Shillman and Brueggemeyer in their answers "sufficiently establish[ed] their responsibility for the subject violations." Initial Decision (Order on Remand), September 26, 1988, p.9. More importantly, however, as shown above, Respondents did not take advantage of their opportunity to refute those facts in the pre-remand record relied upon by Complainant in its accelerated decision motion.

IV.

Finally, Respondents argue that the Presiding Officer erred in granting Complainant's motion for an accelerated decision because there are genuine issues of fact in dispute and Complainant was not entitled to judgment as a matter of law. After considering the entire record, I conclude that the Presiding Officer did not abuse his discretion in granting Complainant's motion.

Pursuant to 40 CFR s22.20, Complainant moved for an accelerated decision on its Second Amended Complaint based upon the facts established by the pre-remand proceedings. As explained above, the Presiding Officer appropriately concluded that on remand he need

only address the issue of whether Respondents could be held liable for the $25,000 civil penalty. In considering the motion for accelerated judgment on this issue, the Presiding Officer was entitled to examine the pre-remand record, [FN20] and the pleadings filed after the Second Amended Complaint. [FN21]

Respondents' answers to the Second Amended Complaint, and the pre-remand record on this issue (which largely consists of Shillman's testimony), establish that the Partnership, and not the Corporation, owned the hazardous waste facility on the date of the alleged violations, and that Shillman had overall responsibility for and managed the operations at the facility on the date of the violations. In addition, the answers and the record established that Brueggemeyer and Vasi were partners in the Partnership, and that when the Partnership was transformed into the Corporation, Brueggemeyer became a shareholder, director and officer of the Corporation.

To defeat Complainant's motion, Respondents had to demonstrate an issue of material fact, or that Complainant was not entitled to judgment as a matter of law. As explained above, Respondents failed to demonstrate any dispute as to the facts in the record relied upon by Complainant. Respondents answers to the Second Amended Complaint alone are not enough to create a factual issue in light of the extensive record Complainant cited in support of its motion. [FN22]

Respondents also failed to demonstrate that Complainant was not entitled to judgment as a matter of law. Respondents were charged with violating RCRA, 42 U.S.C. s6924, and its implementing regulations, the Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage and Disposal Facilities, 40 CFR

Part 265. For the purposes of the Interim Status Standards, an owner is a person who owns a facility, and an operator is a person who is responsible for the overall operation of the facility. 40 CFR s260.10. A "person" includes individuals and partnerships. Id.

The Presiding Officer did not abuse his discretion in determining that Shillman was an operator in light of Shillman's testimony and admissions that he had overall responsibility for the operation of the hazardous waste facility. Shillman concedes as much in his brief. Respondents Brief, p.15.

The Presiding Officer concluded that Brueggemeyer was an owner because she was a partner in the Partnership which owned the facility on the date of the violations. The Partnership asserts that it cannot be responsible because the September 1988 Initial Decision does not make a finding as to it. Brueggemeyer argues that because there is no finding as to the Partnership, she cannot be liable in her capacity as partner.

In his final order, the Presiding Officer states that the penalty is assessed against Shillman and "Dorothy Brueggemeyer and John Vasi, d/b/a J.V. Peters and Company, a partnership." Initial Decision (Order on Remand), September 26, 1988, p. 11 (emphasis added). Moreover, the Presiding Officer expressly stated that his findings were "additional" to those made in the May 1985 Initial Decision, thereby incorporating the findings in the earlier decision. Initial Decision (Order on Remand), September 26, 1988, p.3. Thus, there is no merit to the Partnership's assertions that the initial decision Appealed from did not make any findings as to the Partnership.

Because the Partnership was found liable, Brueggemeyer can be found liable in her capacity as partner. Even if such a finding had not

been made, however, Brueggemeyer could still be liable because Ohio law follows the aggregate theory of partnership, which regards a partnership as a sum of the partners, and not the entity theory, which regards a partnership as an entity distinct from those partners. Fairway Development Co. v. Title Insurance Co. of Minnesota, 621 F. Supp. 120, 122 (N.D. Ohio 1985). Under Ohio law, partners can be sued for partnership obligations that arose prior to the dissolution of the partnership. Reed v. Ramey, 82 Ohio App. 171, 50 N.E.2d 250, 254 (1947).

Brueggemeyer also argues that there is no evidence in the record to support the conclusion that she was a partner in the Partnership on the date of the violations. The record establishes that Brueggemeyer was a partner in the Partnership when it was formed in May 1980, and that upon the transformation of the Partnership to the Corporation in January 1981, she became a shareholder, officer and director in the Corporation. Absent any evidence as to Brueggemeyer's status in the Partnership in the interim period, the Presiding Officer did not abuse his discretion by concluding that Brueggemeyer remained a partner during this time. It was incumbent upon Brueggemeyer to supply evidence of her partnership status during this time in responding to Complainant's motion for accelerated decision. This she did not do.

Lastly, Brueggemeyer argues that she cannot be liable because the definition of "person" in 40 CFR s260.10 does not specifically include "partners." Not surprisingly, the definition of person in 40 CFR s260.10 is identical to the definition of "person" in the RCRA statute itself, 42 U.S.C. s6903(15). The RCRA definition, which includes both individuals and corporations, has been interpreted not to exclude corporate officers or employees. United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726, 745 (8th Cir. 1986),

cert. denied, 484 U.S. 848 (1987); United States v. Johnson & Towers, Inc., 741 F.2d 662, 665-666 (3rd Cir. 1984), cert. denied, 469 U.S. 1208 (1985). Likewise, neither the RCRA definition nor 40 CFR s260.10 would exclude partners from liability.

Because Respondents failed to demonstrate an issue of material fact and that Complainant was not entitled to a judgment as a matter of law, the Presiding Officer did not abuse his discretion in granting Complainant's motion for an accelerated decision.

Final Order

Respondents David B. Shillman, Dorothy L. Brueggemeyer and J.V. Peters and Co., and John Vasi, are jointly and severally liable for the payment of a civil penalty of $25,000 for violations of the Resource Conservation and Recovery Act and its implementing regulations. Payment shall be made within 60 days, unless otherwise agreed to by the parties, by cashier's check, for the full amount of the penalty, payable to the Treasurer, United States of America, and mailed to:

Regional Hearing Clerk
U.S. EPA, Region 5
P.O. Box 70753
Chicago, Illinois 60673

At the time of submittal, a copy of said check shall be sent to:

Regional Hearing Clerk
Office of Regional Counsel
U.S. EPA, Region 5
230 South Dearborn Street
Chicago, Illinois 60604

Failure to remit the civil penalty may result in the initiation of a collection action by the United States Attorney.
So ordered.

Ronald L. McCallum
Chief Judicial Officer

FN1 These facts were provided by Shillman's testimony at the October 1984 hearing.

FN2 The eighteen violations are detailed in the May 15, 1985 Initial Decision and need not be repeated here.

FN3 The Partnership, the Corporation and Shillman had also argued that the findings as to the violations and the penalty were not supported by the evidence. The Chief Judicial Officer, however, did not address this argument, either on direct Appeal or upon Complainant's motion to reconsider the Remand Order. Respondents do not raise this argument in this Appeal.

FN4 By failing to answer the Second Amended Complaint, Vasi was in default under 40 CFR s22.17, and he thereby admitted all of the allegations in the complaint. Accordingly the Presiding Officer found him jointly and severally liable with Shillman and Brueggemeyer. Vasi did not Appeal the Presiding Officer's decision.

FN5 In his answer to the Second Amended Complaint, Shillman admitted that he "exercised complete control and authority over operations at the facility," (Answer to paragraph 5), and that he had "overall responsibility for and managed the operations at the facility * * * during the period prior to January 27, 1981, and subsequently had overall responsibility for and managed the operations at the facility." (Answer to paragraph 19). Unlike some of Shillman's other answers to the allegations in the Second Amended Complaint, these answers are consistent with his hearing testimony.

FN6 See 40 CFR s260.10.

FN7 In her answer to the Second Amended Complaint, Brueggemeyer admits that she and Vasi were partners, but denies the allegation that "[s]aid partnership, known as J.V. Peters and Co., was formed subsequent to procurement by Shillman of said lease and prior to commencement of business." (Answer to paragraph 7). Shillman, however, testified under oath that Brueggemeyer and Vasi were partners in the Partnership, and admitted this in his answer. (Answer to paragraph 7). Brueggemeyer failed to produce any affidavit or other evidence refuting these portions of the record in response to Complainant's motion for accelerated decision.

FN8 See 40 CFR s260.10.

FN9 RCRA does not contain a specific limitation period in which to commence an action to enforce a civil penalty. Although there appears to be no decision applying a statute of limitations to a RCRA civil enforcement action, several courts have applied 28 U.S.C. s2462 to the civil enforcement of other environmental statutes. See United States v. Central Soya, Inc., 697 F.2d 165, 169 (7th Cir. 1982) (Rivers

and Harbors Act); United States v. SCM Corp., 667 F. Supp. 1110, 1123 (D. Md. 1987) (Clean Air Act); Chesapeake Bay Foundation v. Bethlehem Steel Corp., 608 F. Supp. 440, 448 (D. Md. 1985) (citizen enforcement of Clean Water Act); United States v. C & R Trucking Co., 537 F. Supp. 1080, 1083 (N.D. W.Va. 1982) (Clean Water Act).

FN10 40 CFR s22.01(c) ("Questions arising at any stage of the proceeding which are not addressed in these rules or in the relevant supplementary procedures shall be resolved at the discretion of the Administrator * * *). The Administrator has delegated this authority to the Chief Judicial Officer. 40 CFR s22.04.

FN11 Throughout these proceedings, Respondents have been represented by the same attorney who also represented the Corporation in the pre-remand proceedings. This same attorney also represented the Corporation, Shillman and Brueggemeyer in other related proceedings arising out of the operation of this hazardous waste facility. See J.V. Peters & Co., Inc. v. Hazardous Waste Facility Approval Board, et al., 596 F. Supp. 1556 (S.D. Ohio 1984); J.V. Peters & Co., Inc. et al. v. Ruckelshaus, No. C 83-4436 (United States District Court for the Northern District of Ohio, February 17, 1984); J.V. Peters & Co., Inc. et al. v. Knight Ridder Co., et al., No. CV 82-8-2387 (Court of Appeals of Ohio, March 21, 1984); Ohio ex rel. Brown v. J.V. Peters & Co., et al., No. 81 M 272 (Court of Common Pleas, Geauga County, May 19, 1981). These cases are in the record as attachments G, H, E and A respectively to Complainant's Reply Brief filed in April 1985.

FN12 The conclusion that there is an identity of interests between the Corporation and Respondents is consistent with the Remand Order previously issued in this case. The determination that the Second Amended Complaint relates back to the April 1985 motion

to amend is consistent with the Remand Order which, in effect, granted Complainant's motion to amend. In addition, the Remand Order focused on the concept of "notice" as it pertained to service of process and personal jurisdiction. In contrast, the relation back doctrine involves a less demanding type of "notice."

FN13 The evidence at that point, specifically Shillman's testimony, also demonstrated that Brueggemeyer and Vasi were partners in the Partnership.

FN14 See, e.g., Kilkenny v. Arco Marine, Inc., 800 F.2d 853 (9th Cir. 1986), cert. denied, 480 U.S. 934 (1987); Keller v. United States, 667 F. Supp. 1351 (S.D. Cal. 1987); Potts v. Allis-Chalmers Corp., 118 F.R.D. 597 (N.D. Ill. 1987).

FN15 See, e.g., Mayes v. AT&T Information Systems, Inc., 867 F.2d 1172 (8th Cir. 1989); Chaddock v. Johns-Manville Sales Corp., 577 F. Supp. 937 (S.D. Ohio 1984); Hampton v. Hanrahan, 522 F. Supp. 140 (N.D. Ill. 1981).

FN16 Even if Complainant's motion to amend was not filed within the limitations period, relation back is still permissible based upon an identity of interests. See Anderson v. Deere & Co., 852 F.2d 1244 (10th Cir. 1988) (plaintiff learned identity of true defendant after limitations period had run, and then waited an additional nine months before seeking leave of court); Franklin v. Norfolk & Western Railway Co., 694 F. Supp. 196 (S.D. W.Va.) (motion filed after statute had run when court ruled that piercing corporate veil was not appropriate); Seber v. Daniels Transfer Co., 618 F. Supp. 1311 (D. Pa. 1983) (motion to amend filed four months after limitations period ended). See also Kirk v. Cronvich, 629 F.2d 404 (5th Cir. 1980) (initial complaint

dismissed after limitations period expired on ground that defendant was not capable of being sued, and plaintiff's subsequent amended complaint naming new defendant related back to original).

FN17 Respondents were charged with violating RCRA, which mandates a public hearing upon request. 42 U.S.C. s6928(b). The Corporation requested hearing in response to the First Amended Complaint, which was held in October 1984.

FN18 5 U.S.C. s500 et seq.

FN19 See 40 CFR s22.16(b) (a party's response to a written motion "shall be accompanied by any affidavit, certificate, or other evidence" relied upon).

FN20 See 40 CFR s22.20(a) (moving party may rely upon "additional evidence" to support a motion for accelerated decision); Marine Overseas Services, Inc. v. Crossocean Shipping Co., Inc., 791 F.2d 1227, 1233 n.3 (5th Cir. 1986) (a trial court may, on remand, make any additional fact findings on the basis of the record as it is already developed without additional discovery or court proceedings); Pineman v. Oechslin, 616 F. Supp. 1227, 1229-1230 (D.Conn. 1985) (on remand, pleadings and admissions filed prior to initial ruling which was vacated were not rendered void by decision to remand).

FN21 40 CFR s22.20 is comparable to Rule 56(c) of the Federal Rules of Civil Procedure, which by analogy provides guidance. See In re BKK Corp., RCRA (3008) Appeal No. 84-5 (May 10, 1985), vacated on other grounds, RCRA Appeal No. 84-5 (October 23, 1985). Rule 56(c) allows a summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."

FN22 See Fed. R. Civ. P. 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.")

3 E.A.D. 280, 1990 WL 303851 (E.P.A.)

Before the United States Environmental Protection Agency
Environmental Appeals Board

IN THE MATTER OF: J.V. PETERS AND COMPANY,
INCORPORATED, ET AL.,
REPSONDENT

Resource Conservation and Recovery Act

RCRA Docket Number V-W-81-R-75 (Remanded by Chief Judicial Officer)
RCRA (3008) Appeal No. 85-4)
September 26, 1988

INITIAL DECISION

(ORDER ON REMAND)

COMES NOW the Complainant (hereinafter "C"), United States Environmental Protection Agency (hereinafter "EPA" or "the Agency) and files its "Motion for Accelerated Decision", pursuant to 40 CFR 22.20, contending that, on this record, including its Second Amended Complaint and the respective Answers filed in response thereto, by Respondents (hereinafter "R") J.V. Peters, a partnership, J.V. Peters and Company, Inc., David B. Shillman and Dorothy Brueggemeyer, there remain no genuine issues of material fact and, as a matter of law, Respondents should be found responsible for the violations alleged and be ordered to pay the civil penalty proposed. Respondent John Vasi, served with said pleading on June 14, 1988, did not file an Answer to said Second Amended Complaint and should be

and is hereby found to be in default under the provisions of 40 CFR 22.17.

The First Amended Complaint, alleging that violations were found during an inspection on December 17, 1980, was dated and filed on January 31, 1984, and February 7, 1984, respectively. Respondent's Answer and Request for Hearing was timely filed and hearing was ultimately held in Cleveland, Ohio, on October 23, 24 and 25, 1984. Following said evidentiary hearing, and after a succession of post-trial Motions and filing of post-hearing briefs and proposed findings, my Initial Decision was issued on May 15, 1985, finding that David B. Shillman, severally and jointly with his partners, if any, was responsible for the violations shown by the evidence (Initial Decision, page 24, Conclusions of Law Numbers 1 and 2). A civil penalty was assessed against Shillman in the total sum of $25,000.00 (Initial Decision, page 35), it being found that he was a managing partner of J.V. Peters and Company, a partnership. I further concluded that "As a partner, he is entitled to seek contribution from others who he may show to have been partners" (Initial Decision, Conclusion 4, page 25). I further concluded that, on the basis of evidence, the corporation J.V. Peters and Company, Inc. should be disregarded and that satisfaction of all obligations incurred from the subject operation should be the responsibility of the persons shown, with Shillman, to comprise the partnership (Initial Decision, pages 24-25, Conclusions 3 and 5).

On May 9, 1986, said Initial Decision was "vacated" and the case was remanded by the Chief Judicial Officer (Remand, page 16) "to allow Complainant to amend its complaint (if it wished), and to allow the case to proceed in a manner consistent with this opinion."

In the Remand, page 5, it is stated:

"The Presiding Officer issued his Initial Decision . . . holding that Shillman, the partnership and the corporation were jointly and severally liable for the violations . . . There is some confusion as to whether all three were also held responsible for the $25,000 civil penalty."

At page 7, the Remand continues:

"As explained below, further proceedings will be necessary to determine if any of the three [FN1] can or should be held liable for the penalty" (emphasis supplied).

And at page 9, the Remand further states:

". . . it is reasonable to assume that a fair trial of the issue would have given the unnamed parties an opportunity to present evidence at the hearing to contest responsibility for the violations and an opportunity for Shillman to substantiate his claim that he was not a member of the partnership" (emphasis supplied).

The "Remand" does not disturb the findings set forth in the Initial Decision that the subject violations occurred; but it does require the case to proceed to establish which, if any, of the Respondents, now named in said Second Amended Complaint, are responsible for said violations for which a civil penalty in the total sum of $25,000.00 has been found to be appropriate (Remand, pages 9-11).

40 CFR 22.20(a) (Accelerated Decision) provides that an accelerated decision may be rendered . . . without further evidence . . . "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law . . .". It is not disputed [FN2] that said provision is analogous to Federal Rule of Civil Procedure (FRCP) 56(c), which provides that summary judgment is proper "if the pleadings, depositions, answer to interrogations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" (emphasis supplied).

On the record before me, including the pleadings and the record evidence elicited at said evidentiary hearing, I make the following additional

FINDINGS OF FACT

1. Respondent David B. Shillman (hereinafter "Shillman") individually procured a lease with option to purchase the site of subject operation circa May, 1980 (Complaint, page 2, paragraph 2, and Shillman's Answer thereto).

2. Shillman filed, in August, 1980, a Notification of Hazardous Waste Activities and, on September 4, 1980, filed a Part A application for a permit and signed the letter of transmittal, and said Notification and Part A application, on behalf of J.V. Peters Company as its Secretary-Treasurer (Shillman Answer to paragraph 4, Second Amended Complaint (hereinafter "Cplt"); C Exhibit (hereinafter "Ex") 4).

3. Shillman was the responsible party with respect to operation of subject facility (Shillman Answer to paragraph 5, Cplt).

4. Subject partnership, known as J.V. Peters and Company, was comprised of Respondent Dorothy L. Brueggemeyer, Shillman's wife, and Respondent John Vasi (Answers of Partnership, Shillman and Brueggemeyer to paragraph 7, Cplt; Transcript (hereinafter "TR) 550).

5. The site of subject operation was two acres on which Shillman indivually procured a lease, with option to purchase, in May, 1980 (TR 549-550).

6. The partnership business consisted of picking up, transporting and collecting, at the site, spent industrial solvents which were disposed of, usually by sale, to a user or "reclaimant" (Answers of Shillman and Brueggemeyer to paragraph 10, Cplt; TR 433).

7. Shillman maintained control of what materials were received at subject hazardous waste site (Answers of Shillman and Brueggemeyer to paragraph 10, Cplt; TR 472).

8. On or about January 30, 1981, subject partnership transferred both its assets and liabilities to a newly formed corporation, J.V. Peters and Co., Inc. (Answers of Shillman and Brueggemeyer to paragraph 14, Cplt).

9. After organization of J.V. Peters and Co., Inc., the directors of the corporation first met on February 2, 1981, when Respondent Shillman was elected Chairman of the Board and President of the Corporation. At said meeting, Respondent Brueggemeyer was elected director and Secretary-Treasurer of the Corporation. At said meeting,

the Corporation adopted a resolution and thereby entered into an Employment Agreement whereby Shillman was to serve as President and Chief Executive Officer and receive compensation equal to 20% of the net profits of the corporation. A further resolution, proposed by Shillman, authorized him, acting alone, to withdraw funds from the corporate bank account and to borrow money, acting concurrently with the secretary of the corporation (Shillman Answer to paragraph 17, Cplt; R Ex 11).

10. David B. Shillman had overall responsibility for and managed the operations at the facility, and represented himself as Secretary-Treasurer of J.V. Peters and Co., during the period prior to January 27, 1981, and subsequently had overall responsibility for and managed the operations at the facility and represented himself as President of J.V. Peters and Co., Inc. (Shillman Answer to paragraph 19, Cplt; R Exs 8, 9 and 10; C Ex 4).

11. The State of Ohio sued J.V. Peters and Co. in April, 1981, seeking an injunction against further operation at subject site until an appropriate state permit was obtained (Shillman Answer to paragraph 23, Cplt).

12. Letters sent by the Ohio EPA, on November 10, 1980, and January 14, 1981, to John Vasi, as President of J.V. Peters and Co. (concerning inspection of subject facility on December 8, 1980) were received and acknowledged by Respondent David Shillman (C Exs 1, 5 and 6; Findings 82 and 83, Initial Decision).

13. On July 3, 1981, the Ohio EPA inspector attempted to enter the facility to check compliance with a Court Order closing it; she was denied access by David Shillman (Finding 97, Initial Decision).

14. Respondent John Vasi, who was personally served and did not file an Answer to said Second Amended Complaint, is in default and has thereby admitted all of the factual allegations in said Complaint (40 CFR s22.15(d), 22.17(a)(1)).

CONCLUSIONS OF LAW

1. David B. Shillman was the "operator" of subject facility, i.e., the person responsible for its overall operation, and as such violated the Resource Conservation and Recovery Act (hereinafter "RCRA" or "the Act") and the regulations promulgated pursuant thereto, for which violations a civil penalty should and will be assessed against him (40 CFR 260.10).

2. Respondents Dorothy Brueggemeyer and John Vasi, as partners in J.V. Peters and Company, a partnership which existed at the time of the inspections of subject facility on December 8, 1980, and December 17, 1980, are "owners" of said facility, i.e., persons who owned all or part of said facility and, as such, violated the Act and regulations promulgated pursuant thereto, for which violations a civil penalty should and will be assessed against them (40 CFR 260.10).

3. Respondents David B. Shillman, Dorothy Brueggemeyer and John Vasi, being, respectively, the operator and owners of subject facility [FN3] at the time and in the particulars alleged in said Second Amended Complaint, are jointly and severally liable for a civil penalty in the sum of $25,000.00 (AARCOM, Inc., Drexler Enterprises, Inc., et al., RCRA (3008) Appeal No. 86-6, 1.c. 6-8, citing United States v. Johnson & Towers, Inc., 741 F.2d 662 (3rd Cir., 1984); 42 USC s6924; Finding 6, page 25, Initial Decision issued on May 15, 1985; see also

"Order on Interlocutory Appeal", Hawaiian Western Steel Limited, Inc. et al. Docket No. RCRA-09-87-0006).

4. On this record, Respondent J.V. Peters and Company, Inc., was incorporated on or about January 30, 1981, and, thus, was not in existence in December, 1980, when the subject inspections were made and the subject violations were found to exist. It is, therefore, here concluded that said corporation is not responsible for such violations. It has been previously concluded that said incorporation was a nullity and should be disregarded and be treated as the subject partnership (Conclusion 3, page 24, Initial Decision).

5. Respondents Dorothy Brueggemeyer and John Vasi, partners owning J.V. Peters and Company, a partnership, are jointly and severally responsible and liable for the civil penalty assessed for subject violations along with David B. Shillman, who, on this record, was responsible for said overall operation and thus its "operator" and also a "de facto" partner for the reasons set forth in Conclusion 4, page 25, of the Initial Decision issued herein on May 15, 1985.

DISCUSSION

On the basis of the record evidence, judicial admissions and the conclusions reached upon consideration of the briefs and arguments of Counsel, I find that the Complainant's Motion for an Accelerated Decision should be and it is hereby granted. I find that David B. Shillman, Dorothy Brueggemeyer and John Vasi, as operator and owners respectively of subject facility, are jointly and severally liable for the violations found and should be and will be ordered to pay the appropriate penalty of $25,000.

As pointed out, supra, the Remand provided, [FN4] as cited by Respondent Counsel's Argument, page 6, that the unnamed parties be given "an opportunity to present evidence . . . to contest responsibility for the violations . . ."

John Vasi did not file an Answer after being duly served with a copy of the Second Amended Complaint and, by such failure to Answer, admits all of the allegations in said Complaint, including the fact that he was a partner in J.V. Peters and Company, the partnership (Finding 14, page 6, supra). David B. Shillman and Dorothy Brueggemeyer were duly served with said Second Amended Complaint and filed their Answers to each allegation therein. The "additional findings", supra, setting forth the factual allegations by them admitted, are sufficient to conclude that Dorothy Brueggemeyer was a partner with John Vasi and that they comprised the partnership known as J.V. Peters and Company and as owners were responsible for violations along with the "operator" of said facility, David B. Shillman. That Shillman was responsible, at all times, for operation of subject facility is apparent.

Complainant urges and Respondent Counsel resists application of the Law of the Case Doctrine as discussed by the Court in Central Soya Co., Inc. v. Geo. A. Hormel Co., 723 F.2d 1573, 1.c. 1580 (12-13). It is not necessary to determine if said doctrine (which "acts as a deterrent to vacillation on arguable issues") is here appropriate. To decide issues other than determining the parties responsible for subject violations is beyond the scope of the Order of Remand, which orders that the person or persons responsible for the violations should be identified. Those persons have been pinpointed by the admissions in the pleadings. The Chief Judicial Officer, in limiting this inquiry, was probably mindful of the Doctrine, as stated by the Court in Central

Soya, supra, which "expresses the practice of courts . . . to refuse to reopen what has been decided", citing Messenger v. Anderson, 25 U.S. 436, 444, 32 S.Ct. 739, 740 (1912); "No litigant deserves an opportunity to go over the same ground twice . . . ", citing U.S. v. Turtle Mountain BCI, 612 F.2d 517 (1979).

The analogy to the language cited above becomes apparent when the Answers filed in the instant proceeding by Shillman and Brueggemeyer again reveal that Shillman was informed as to what transpired with respect to the subject violations while Brueggemeyer claims insufficient knowledge. Further, the Answers of the partnership and corporation were made through Counsel, and failed to divulge the identity of the partners or of the officers of the corporation [FN5] who are required by Rule to clearly and directly admit, deny or explain each of the factual allegations contained in the Second Amended Complaint with regard to which Respondent "has any knowledge" (40 CFR 22.15(b)). The admissions of Shillman and Brueggemeyer in their respective Answers sufficiently establish their responsibility for the subject violations (Findings 3, 4, 7, 9, 10 and 13, supra).

Respondents' Counsel urges that the Five Year Statute of Limitations provided in 28 USC s2462 is here applicable, arguing that the statute started to run on December 17, 1980, and thus "ran out" on December 17, 1985. The subject Second Amended Complaint was filed on November 16, 1987.

I reject said argument because the "civil penalty" here sought is a civil administrative sanction, regulatory in nature and remedial in character, and is not considered penal in any sense, but assessed for the sole purpose of achieving compliance with the Act (RCRA). U.S. v. Davis, 136 F.S. 423 (1955) states, 1.c. 427, that the general rule is that

the statutes of limitation do not ordinarily run against the United States, and that 28 USC s2462 is an exception to be strictly construed. In holding that said Statute of Limitations does not apply where the government is seeking to recover civil damages and is not attempting to apply a penalty, the Court stated, 1.c. 426(2):

> "Defendant's contention that the present action (Anti Kick-back Act) is barred by the provisions of 28 USC s2462 is without merit . . . that statute has no application to cases wherein the Government is seeking to recover civil damages and is not attempting to apply a penalty."

In U.S. v. Schneider, 139 F.S. 826, 828, it was held that the availability of said Section 2462 turned upon whether the Surplus Property Act imposed a civil penalty or a civil sanction of a remedial character. The Court quoted Helvering v. Mitchell, 1938, 303 U.S. 391, that civil administrative sanctions are not to be considered penal in any sense and that said Section 2462 could not be pleaded as a defense. See also U.S. v. Chas. George Trucking Co., Inc. (1986), 642 F.S. 329, 1.c. 334, holding that the civil penalty provision of RCRA is essentially regulatory, seeking to enhance compliance with the Act rather than impose penal sanctions on those who violate the statute, in view of Congressional intent that penalty serve (as) a civil sanction, fact that imposition of penalty does not require scienter, and fact that penalty imposes no affirmative restraint.

In the premises, and pursuant to subject Order in the Remand hereof on May 9, 1986, I find that Complainant's Motion for an Accelerated Decision should be and it is hereby granted for the reason that, based on the Judicial Admissions contained in the pleadings,

Respondent Dorothy Brueggemeyer, as a partner in J.V. Peters and Co., a partnerhip, with defaulting Respondent John Vasi, is an owner, as defined in the applicable regulations, along with Respondent John Vasi, of the subject partnership facility on which the subject violations occurred; that the owners of said facility are liable, jointly and severally, with the "operator" of said facility, viz., Respondent David B. Shillman (see cases cited, supra, Conclusion of Law No. 3, page 6).

Accordingly, I propose the issuance of the following

FINAL ORDER [FN6]

1. Pursuant to Section 3008(c) of the Act, 42 USC 6928(c), a civil penalty in the total sum of $25,000 is hereby assessed against David B. Shillman, operator, and Dorothy Brueggemeyer and John Vasi, d/b/a J.V. Peters and Company, a partnership, which civil penalty shall be borne by them jointly and severally.

2. No penalty is assessed against Respondent J.V. Peters and Company, Inc. Payment of full amount of the civil penalty so assessed shall be made by the Respondents named in paragraph 1 of this FINAL ORDER within 60 days of the Service of the FINAL ORDER upon Respondents, by forwarding a Cashier's or Certified Check payable to the Treasurer, United States of America, to

EPA - Region V
(Regional Hearing Clerk)
P.O. Box 70753
Chicago, Illinois 60673.

IT IS SO ORDERED.

Marvin E. Jones
Administrative Law Judge

FN1 "The three" refers to Shillman, the corporation and the partnership.

FN2 See C's Motion for Accelerated Decision, page 7; Respondent's (hereinafter "R") Memorandum Opposing Complainant's said Motion, page 4.

FN3 The instant "further proceedings" were deemed necessary for the stated purpose of determining if some or all of the named Respondents "can or should be held liable for the penalty" (Remand, page 7). Consistent with the opinion, all of the named Respondents were served with process and with the Second Amended Complaint and it is on the basis of the facts admitted in the Responsive Pleadings of the parties that responsibility for the violations and penalty has been determined.

FN4 40 CFR 22.30(c) - "Appeal, Initial Decision" - provides that the Administrator may remand a case for further proceedings.

FN5 40 CFR 22.10 provides that a partner may appear on behalf of a partnership and an officer may appear on behalf of a corporation

FN6 40 CFR 22.27(e) provides that this Initial Decision shall become the Final Order of the Administrator within 45 days after its Service upon the parties unless (1) an Appeal is taken by a party to the

proceedings, or (2) the Administrator elects, sua sponte, to review the Initial Decision. 40 CFR 22.30(a) provides that such Appeal may be taken by filing a Notice of Appeal within 20 days after Service of this Decision.

1988 WL 236321 (E.P.A.)

Before the United States Environmental Protection Agency
Environmental Appeals Board

IN THE MATTER OF J.V. PETERS & COMPANY, INC.,
RESPONDENT

Resource Conservation and Recovery Act

Docket No. V-W-81-R-75
RCRA (3008) Appeal No. 85-4
October 23, 1986

ORDER UPON RECONSIDERATION

By motion dated June 2, 1986, Complainant, U.S. EPA, Region V, seeks reconsideration of an order remanding the above-captioned case. In that Remand it was held that David B. Shillman and J.V. Peters and Company, a partnership, had not received sufficient notice of the complaint so as to be held liable for the violations charged therein. In this motion, EPA argues that Shillman and the partnership were on constructive notice of their joint and several liability; that the rules of administrative procedure do not require strict conformity to the requirements of the Federal Rules of Civil Procedure, Rule 15(b); and that any defense of want of personal jurisdiction was waived by Respondent's failure to raise the defense in its answer to the complaint or by appropriate motion. After consideration of EPA's argument, I must affirm the order remanding this case. Complainant has not raised any new matters or pointed to any facts in the record that did not receive consideration previously.

At issue is a judgment as to what constitutes due process and fundamental fairness in a controversy that has spanned five years,

spawned at least four actions at law, and spread a web of facts and inferences through administrative and court records. In my judgment, based solely upon the record of this administrative proceeding, Shillman and the partnership were never on notice, prior to or during the hearing, that they should present a defense to the violations charged in the complaint; therefore, as a matter of law they cannot be held accountable for those violations.

Shillman and the partnership did not have constructive notice of their potential joint and several liability. The complaint and amended complaint named J.V. Peters & Company, Inc., the corporation, as the sole party- Respondent. EPA's did not file its motion to amend the complaint to add additional parties-respondent until months after the hearing had been adjourned. The corporation's responsibility, at the hearing, was to defend its interests and that of its shareholders against administrative sanctions. Shillman and the partnership were never called upon to defend their respective interests against those administrative sanctions.

EPA renews its argument that Shillman had constructive notice of his potential party status because he signed the partnership's Notice of Hazardous Waste Activity and Part A application as well as Respondent's Answer to the original complaint. The short answer to this argument is that Shillman's acts on behalf of the partnership and his preparation of the corporation's Answer simply did not place Shillman on notice that he should put on a defense against the violations charged against the corporation. EPA also suggests that the Chief Judicial Officer "ignored" evidence that Shillman personally held a lease for the facility's site with an option to purchase and evidence that the corporation was undercapitalized. In point of fact, although not discussed in the Remand, that order is the end-product of a careful

consideration of the entire record, including those factors allegedly ignored by the Chief Judicial Officer. Upon reconsideration, the same flaw in EPA's argument is apparent: the complaint and the hearing never put Shillman and the partnership on notice of their potential liability for the alleged violations, or, stated differently, of their need to present a defense against the charges in the complaint. Consequently, they did not receive a fair opportunity at the hearing to contest the evidence and the conclusions propounded by EPA.

EPA's argument that the Chief Judicial Officer misinterpreted Rule 15(b) of the Federal Rules of Civil Procedure is unavailing. The Rule allows for the trial of issues, not raised by the pleadings, by the express or implied consent of the parties. In the instant case, the parties sought to be charged, Shillman and the partnership, were neither represented at the hearing nor apprised of the issue of their potential party status until EPA filed its post- hearing motion to amend the complaint. Any question of express or implied consent is meaningless in this context.

The cases which EPA has cited in support of its argument are inapposite. In each case, the proper parties were named in the complaint: the dispute in each was as to the sufficiency of the complaints in providing notice of the issues raised by the violations charged. [FN1] For example, In Sunshine Art Studios, Inc., et al.v. Federal Trade Commission, 481 F.2d 1171 (1st Cir. 1973), all of the proper parties were named in the complaint. The error alleged on Appeal was that the Federal Trade Commission, seeking a cease and desist order for unfair trade practices, failed to specify which named party was liable for each of the alleged violations. In the case sub judice, the proper parties were not named in the complaints.

It is true that administrative agencies need not require formal adherence to the Federal Rules of Civil Procedure. Unimportance of pleadings is indeed a virtue. However, neither EPA's nor my own research has produced a case on point that would allow amendment of a complaint to add new parties after a hearing has been adjourned. While the record strongly suggests that Shillman and the partnership should have been aware of their potential party status, they were never called upon to defend that status until EPA's post-hearing motion to amend. More than a "procedural nicety" requires that these parties be given an opportunity to present a case against joint and several liability. The rules of administrative procedure are not formalistic; however, there are fundamental principles of constitutional due process that must be observed to sustain the rule of law. While EPA must vigorously pursue its statutory mission to protect the environment, the credibility of the Agency depends upon the availability of fair notice and procedure to all parties sought to be charged with liability for environmental offenses.

Finally, EPA is correct in asserting that an affirmative defense of lack of personal jurisdiction must be raised in an answer or by appropriate motion. 40 CFR s22.15(b). In this case, however, Shillman and the partnership were never served with a complaint and therefore had no reason to answer or defend against the charges that were never made against them. It was Respondent J.V. Peters & Company, Inc., the corporation, that raised the defense in an untimely fashion. The corporation had no duty to and did not raise this defense on behalf of Shillman or the partnership, who were not then parties to this case. [FN2] The Remand is affirmed.

So ordered.

Ronald L. McCallum
Chief Judicial Officer

FN1 See Golden Grain Macaroni Company v. Federal Trade Commission, 472 F.2d 882 (2d Cir. 1976); National Realty and Construction Company, Inc. v. OSHA Review Commission, 489 F.2d 1257 (D.C. Cir. 1973); ITT Continental Baking Company, Inc. v. Federal Trade Commission, 532 F.2d 207 (2d Cir. 1976); Sunshine Art Studios, Inc. v. Federal Trade Commission, 481 F.2d 1171 (1st Cir. 1973).

FN2 It would be inappropriate to respond to the footnote on page 11 of EPA's Motion for Reconsideration. In the event that this case proceeds to further litigation, this matter may arise again before the Administrator on Appeal.

2 E.A.D. 297, 1986 WL 69034 (E.P.A.)

Before the United States Environmental Protection Agency
Environmental Appeals Board

IN THE MATTER OF J.V. PETERS & COMPANY, INC.,
RESPONDENT

Resource Conservation and Recovery Act

Docket No. V-W-81-R-75
RCRA (3008) Appeal No. 85-4
May 9, 1986

REMAND

Respondent, J.V. Peters & Company, Inc. (JVP), Appeals from an Initial Decision by Administrative Law Judge Marvin E. Jones (Presiding Officer). [FN1] In that Decision, the Presiding Officer "pierced the corporate veil" of JVP to hold Respondent corporation, David B. Shillman, President of JVP, and J.V. Peters and Company, a partnership and predecessor of Respondent corporation, in violation of regulations implementing the Resource Conservation and Recovery Act (RCRA) of 1976, as amended. He concluded as a matter of law that all three were jointly and severally liable for the violations, and he assessed a civil penalty of $25,000. [FN2] For the reasons stated below, I vacate the Initial Decision and remand the case for proceedings consistent with this opinion.

I.

J.V. Peters and Company, the partnership, operated a hazardous waste facility in Middlefield, Ohio, with the purpose of collecting

industrial solvents, transporting them to the Middlefield site, and processing them for sale to a user or "reclaimant." The operation was under the complete authority of David B. Shillman. [FN3] On December 17, 1980, a representative of U.S. EPA inspected the site and found multiple violations of RCRA and its implementing regulations. [FN4] On January 31, 1981, two weeks after receiving a copy of the inspection report and notice of potential enforcement action, the partnership was dissolved and its assets acquired by J.V. Peters & Company, Inc., the corporation.

On April 17, 1981, Complainant filed a complaint against Respondent J.V. Peters & Company, Inc., the corporation, alleging violations of RCRA and its implementing regulations. Although information was then or soon thereafter available to Complainant that JVP did not exist on the date of the alleged violations, this enforcement action progressed against the corporation alone. In September 1983, during continuing settlement negotiations, Complainant withdrew its original complaint without prejudice. An amended complaint was filed on February 7, 1984, again naming only the corporation as Respondent.

A hearing was held on October 23-25, 1984. At the close of Complainant's case- in-chief, Respondent moved to dismiss the case on the grounds that the corporation did not exist on the date of the alleged violations. The motion was denied. However, the Presiding Officer requested the parties to brief the issue in their post-hearing submissions and suggested that the equitable doctrine of "piercing the corporate veil" might be applicable to this case in some (unspecified) manner. Although Complainant opposed the motion to dismiss and alluded to the potential applicability of the equitable doctrine, it did not move during the hearing to amend the complaint to reflect that any other

individual or organization had operated the business on the date in question.

In fact, Complainant did not move to amend its complaint to add any additional parties until prompted by a letter from the Presiding Officer on March 28, 1985, five months after the hearing had been adjourned. The letter referred to the transcript of the first day of testimony during which Complainant, in an unrelated matter, had made an oral motion to amend its complaint to conform the pleadings to evidence relating to an inspection of JVP's facility on December 8, 1980. [FN5] The postadjournment motion was also styled as a motion to conform the pleadings to the evidence, but unlike the earlier oral motion, it sought to amend the complaint to add David B. Shillman and J.V. Peters and Company, the partnership, as parties-Respondent. JVP opposed the Motion.

The Presiding Officer issued his Initial Decision one month later, holding that Shillman, the partnership, and the corporation were jointly and severally liable for the violations charged in the complaint. There is some confusion, however, as to whether all three were also held responsible for the $25,000 civil penalty. The corporation was the only party-Respondent named in the complaint and amended complaint, yet the Initial Decision repeatedly refers to "Respondents" in the plural without specifically identifying who else is embraced by that reference. It seems certain that the Presiding Officer intended to hold Shillman liable for the penalty: his order mentions Shillman by name and states that by reason of Shillman's domination of the enterprise and his participation in the hearing, "there was no need or necessity to issue a summons or to amend pleadings to make him a new party as he was already appearing in the case by counsel (Ocean Accident and Guarantee Corp., Ltd., et al. v. Felgemaker et al., 143 F.2d 950, CCA,

6th Cir. 1944; 47 F.S. 660, 663 [5])." Initial Decision at 31. However, there is no similar finding respecting the partnership; nor does the final order mention the partnership as being directly responsible for the penalty. Adding to the uncertainty is the statement in the final order where the Presiding Officer says that he is assessing a civil penalty of $25,000 against "the Respondent, David B. Shillman, individually and as managing partner of J.V. Peters and Company, a partnership." Initial Decision at 35. As written, the quoted phrase can be read to refer to David B. Shillman alone, but such a reading is suspect because no explanation is given for exclusion of the other two "Respondents." It is possible that the quoted phrase is actually a series that requires completion by the addition of the words "and the partnership," thus making the corporation (the only named "Respondent"), Shillman and the partnership liable for the penalty, just as all three were found jointly and severally liable for the violations. As explained below, further proceedings will be necessary to determine if any of the three can or should be held liable for the penalty.

On Appeal, Respondent argues that Shillman and the partnership were not given timely notice of their potential party status so as to allow them to prepare and present a defense to the charges at the hearing. Complainant filed a responsive brief arguing that the equitable doctrine of "piercing the corporate veil" implies timely notice as against the newly named Respondents. After an exhaustive review of the record, and a conviction that Shillman and the partnership should have been aware of their potential party status throughout these proceedings, I am nevertheless constrained to hold that Respondent's point is well taken: despite such awareness, Shillman and the partnership were never called upon to answer the charges in the Complaint or to present a defense to the charges at the hearing.

II.

Under Federal law, persons entitled to notice of an agency hearing must be timely informed of the time, place and nature of the hearing; the legal authority and jurisdiction under which the hearing is to be held; and the matters of fact and law asserted. [FN6] Although administrative agencies are not bound by the same details of procedure as are courts, they are governed by the same basic requirements of fairness and notice. [FN7] In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), the Supreme Court of the United States held that notice "must be of such a nature as to reasonably convey the required information . . . and it must afford a reasonable time for those interested to make their appearance . . . [I]f with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied." Id. at 314-15.

Federal notions of fairness and due process in the context of conforming pleadings to the evidence to add additional parties are codified in the Federal Rules of Civil Procedure, Rule 15. Although not binding on an administrative agency, [FN8] Rule 15(b) provides guidance by analogy:

(b) Amendments to Conform to the Evidence.

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result

of the trial. If the evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Fed. R. Civ. P., Rule 15(b).

As the Rule plainly states, an issue must be tried for the Rule to be invoked successfully. Here, however, it is apparent that the issue of the potential liability of Shillman and the partnership was not tried at the hearing in October 1984. The case presented by Complainant in no way purported to establish liability on the part of Shillman and the partnership; rather, the evidence consisted of the testimony of the inspector, who testified about the violations found as the result of her inspection, and the testimony of another EPA witness who testified about the calculation of the proposed civil penalty. Because Complainant's case was not directed at the issue of Shillman and the partnership's liability, Shillman's subsequent testimony, which in some respects tended to be selfincriminating, has to be discounted. In short, Complainant's presentation did not join the issue for trial or otherwise give notice to the unnamed parties of their potential party status.

Complainant's motion to amend, five months after the hearing, was clearly prejudicial to the ability of the unnamed parties to mount a defense. [FN9] First, it is by no means certain that the corporation is the proper party to defend the interests of Shillman and the partnership. Although some testimony presented by the corporation tended to show

that Shillman and the partnership were the parties responsible for the site on the date in question, this testimony was consonant with the corporation's interest in defending itself--and possibly its shareholdersagainst a civil penalty; at the same time, the testimony was against the interest of Shillman and the partnership of avoiding joint and several liability. Second, it is reasonable to assume that a fair trial of the issue would have given the unnamed parties an opportunity to present evidence at the hearing to contest responsibility for the violations and an opportunity for Shillman to substantiate his claim that he was not a member of the partnership.

Complainant has not offered an excuse for its lack of diligence in seeking to amend the complaint to add the unnamed parties. There were several opportunities to name the proper parties in the complaint prior to the hearing. In its original complaint, despite implied notice of the unnamed parties' relationship to the operation via the partnership's Notice of Hazardous Waste Activity and its RCRA permit application (Part A) filed during the summer of 1980, Complainant named only the corporation as party-Respondent. Complainant failed to amend its complaint after being expressly told by Shillman, during a settlement conference in the summer of 1981, that the business had been incorporated in late January 1981. [FN10] The unnamed parties were not added to the amended complaint, filed on February 7, 1984, despite Complainant's awareness of related litigation in State v. J.V. Peters and Company, Inc., et al., Slip op. No. 81 M 272 (Ct. of C.P. Geauga County, Ohio, May 29, 1981), naming the corporation, the partnership, and Shillman as parties-Defendant and holding Shillman and the corporation jointly and severally liable for a civil penalty of $15,000. [FN11] The complaint was not amended despite Complainant's receipt of Respondent's Articles of Incorporation, dated January 31, 1981, pursuant to a discovery request.

Complainant also offers no excuse for failing to move to amend the Complaint during the hearing, following Respondent's motion to dismiss the complaint on the grounds that the corporation did not exist on the date of the alleged violations. Although the Presiding Officer and Complainant both referred in passing to to the potential applicability of the equitable doctrine of "piercing the corporate veil," neither one developed this point during the hearing so as to place Shillman and the partnership on notice that they should present a defense to their potential liability. In fact, the Presiding Officer requested that the parties defer discussion of this issue until their post- hearing submissions.

Further, Complainant offers no excuse for failing to move promptly after the hearing to amend the pleadings to conform to the evidence. The hearing was held in October 1984 but Complainant did not take action until approximately five months later when the parties received a letter from the Presiding Officer, dated March 28, 1985, requesting clarification of Complainant's oral motion to amend offered during the first day of the hearing. The Presiding Officer sought explanation as to "what pleadings conform to what evidence." [FN12] Complainant responded by filing its written Motion to Amend on April 16, 1985, seeking to add Shillman and the partnership as parties-Respondent to the complaint. The written motion incorporated by reference Complainant's oral motion to amend, offered during the first day of the hearing. By referring to the oral motion, Complainant evidently sought to relate its written motion back to the first day of the hearing, thereby helping to mitigate against its untimeliness. This attempt to bootstrap the written motion with something that was done at the hearing is not persuasive, for the oral motion was directed at an entirely different subject matter, i.e., it was directed at the introduction of evidence relating to an inspection of the facility on December 8,

1980. Thus, despite ample knowledge and opportunity throughout these proceedings, fair notice comporting with Federal notions of due process was never given to the unnamed parties as to their potential liability, nor has Complainant offered any excuse for the untimeliness of its written Motion to Amend.

Two final matters remain. First, it is necessary to to examine Ocean Accident and Guarantee Corp., Ltd. v. Felgemaker, et al., 143 F.2d 950 (6th Cir. 1944), relied upon by the Presiding Officer as authority to add the unnamed parties. Felgemaker was an action by plaintiffs, husband and wife, who were injured in an automobile accident through the negligence of defendant, an individual who was insured by two insurance companies, one of which was Inter Insurance. Plaintiffs each received a monetary judgment ($10,000 and $2,000) against defendant who was represented in the action by Inter Insurance's attorneys. After the judgments became final but had gone unsatisfied for over thirty days, plaintiffs each filed an amended and supplemental complaint seeking to add Inter Insurance as a partydefendant in the original action. Inter Insurance defended on the sole ground that the court lacked personal jurisdiction over it (the company was located and did business outside the court's district). The trial court held that it had jurisdiction by reason of the insurance company's general appearance in the suits against its insured, since the company had actively defended the case through its attorneys, had filed an answer to the complaint, had exercised absolute and complete control over the proceedings, had a right to present testimony, had crossexamined witnesses, had Appealed from judgment, and had been so fully connected with the interest being litigated that Inter Insurance was effectively defending itself. Accordingly, the trial court rejected the insurance company's contention that the court lacked jurisdiction over it. The court then held that Inter Insurance was required to answer the

amended and supplemental complaints. Judgment was entered against the company following a hearing.

In the case sub judice, Shillman participated as a witness in the defense of the corporation. However, this fact, either alone or in conjunction with findings purporting to identify Shillman as the real party in interest, does not justify holding Shillman liable without first filing charges against him and giving him an opportunity to answer these charges, including the right to present evidence at a hearing to refute the charges that he is in fact the real party in interest. Felgemaker accorded such rights to Inter Insurance and I am persuaded that Shillman and the partnership are entitled to nothing less. Accordingly, I do not read Felgemaker as authority for holding Shillman liable for the violations alleged in the complaint against the corporation.

Finally, the confusion surrounding the proper party issue may be attributable in part to the corporation's failure to raise its defense of lack of personal jurisdiction (allegedly because it was not in existence when the violations occurred) when it answered the complaint. Had it raised the defense at that time, rather than waiting until the close of complainant's case-in-chief, it is possible that complainant might have realized its error sooner--that is, prior to the hearing. Nevertheless, as previously indicated, Complainant's error was basically inexcusable and cannot be attributed entirely to Respondent. Still, Respondent's failure to raise its affirmative defense in a timely manner does bear upon my ultimate disposition of this case: rather than dismissing the case, I am persuaded that the appropriate resolution of this matter is to vacate the Initial Decision and remand the case to allow Complainant to amend its complaint, if it so wishes, and to allow the case to proceed in a manner consistent with this opinion.

So ordered.

Ronald L. McCallum
Chief Judicial Officer

FN1 40 CFR s22.30 (1980) provides that initial decisions of presiding officers may be Appealed to the Administrator or his delegatee.

FN2 As will be discussed in this opinion, there is some confusion as to the proper interpretation of the Presiding Officer's final order. All three entities were found liable for the violations charged, but it is unclear whether all three were held responsible for the civil penalty.

FN3 Although Shillman admits that he organized the partnership and managed its operations, he argues that he was not a partner.

FN4 Violations of the following regulations were found:

40 CFR s265.13(a)(1): failure to obtain a detailed chemical and physical analysis of representative samples of waste handled at its facility prior to treatment and storage.

40 CFR s265.13(b): failure to develop and follow a written waste analysis plan.

40 CFR s165.14(b): failure to install either a barrier around the active portions of the facility or 24-hour surveillance.

40 CFR s265.14(c): failure to post signs bearing the legend "Danger- Unauthorized Personnel Feep Out" at each entrance to the facility.

40 CFR ss265.15(b) and (d): failure to create and maintain at the facility a written inspection schedule and log.

40 CFR s265.16(d): failure to create and maintain at the facility personnel records which list the job titles and describe the type and amount of introductory and continuing training provided to each hazardous waste management person.

40 CFR s265.32(a): failure to have installed an internal communications system or alarm capable of providing emergency instruction to facility personnel.

40 CFR s265.32(c): failure to maintain adequate fire extinguishers, spill control and decontamination equipment at the facility.

40 CFR s265.32(d): failure to have available at the facility water at adequate volume and pressure, or foam-producing equipment, automatic sprinklers or water spray systems.

40 CFR s265.34(a): failure to have accessible, whenever hazardous waste was being mixed, poured or otherwise handled, an internal alarm or emergency communication device.

40 CFR s265.35: failureto maintain aisle space to allow unobstructed movement of personnel, fire control equipment, spill

control equipment and decontamination equipment to any area of the facility operation in an emergency.

40 CFR s265.37: failure to make any arrangements with appropriate state and local emergency response officials.

40 CFR ss265.51 through 265.56: failure to create, maintain and follow a contingency plan for the facility.

40 CFR s265.73: failure to create and maintain at the facility a written operating record.

40 CFR s265.74: failure to make available, upon request and at all reasonable times, all required records.

40 CFR s165.173(a): failure to maintain containers of hazardous waste, not being handled or processed, in a closed condition.

40 CFR s265.176: storage of containers of flammable hazardous waste within 15 meters (50 feet) of the property line of the facility.

40 CFR ss265.110 through 265.115: failure to have and to activate a closure plan for the facility.

FN5 The letter referred to Complainant's Motion to Amend appearing at page 43 of the Notes of Testimony (N.T.).

FN6 Administrative Procedure Act, 5 U.S.C. s554(b).

FN7 Hess and Clark, Division of Rhodia, Inc. v. Food and Drug Administration, 495 F.2d 975 (D.C. Cir. 1974).

FN8 Oak Tree Farm Dairy, Inc. v. Block, 544 F. Supp. 1351, 1356 n. 3 (E.D. N.Y. 1982) (administrative agencies not bound by standards of Fed. R. Civ. P. - agencies enjoy wide discretion in fashioning own rules of procedure).

FN9 See 3 Moore's Federal Practice, p15 at 15-130 to 15-131 (2d ed. 1985):

> The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues upon which the case is tried; therefore an amendment after judgment which brings in some entirely extrinsic issue or changes the theory on which the case was actually tried is not permissible, even though there is evidence in the record--introduced as relevant to some other issue --which would support the amendment. This principle is sound, since it cannot be fairly said that there is any implied consent to try an issue if the parties do not squarely recognize it as an issue in the trial. The test should be whether the defendant would be prejudiced by the implied amendment, i.e., whether he had a fair opportunity to defend and whether he could offer any additional evidence if the case were to be retried on a different theory.

FN10 "J.V. Peters Informal Settlement Conference Notes," June 29, 1981. Although the Consolidated Rules of Practice, 40 CFR s22.22(a), generally exclude evidence arising from settlement

negotiations, the rule expressly adopts the standard enunciated in the Federal Rules of Evidence, Rule 408, including an exception that allows admission of "evidence otherwise discoverable."

FN11 See Motion for Leave to Withdraw *Administrative* Complaint, September 16, 1983, demonstrating Complainant's awareness of the State proceedings.

FN12 Letter of March 28, 1985.

2 E.A.D. 177, 1986 WL 69028 (E.P.A.)

Before the United States Environmental Protection Agency
Office of the Administrator

IN THE MATTER OF J.V. PETERS & CO., INC., RESPONDENT

Resource Conservation and Recovery Act

RCRA Docket V-W-81-R-75
May 15, 1985

For Complainant
Jonathan T. McPhee
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region V
Chicago, Illinois 60604
For Respondent
Brent L. English, Esquire
Cleveland, Ohio 44114

1. Partnership - A partnership is created when persons join together their money, goods, labor or skill for the purpose of carrying on a trade or business and where there is a community of interest in the profits and and losses resulting from such effort.

2. Partnership - Where the rights of third persons are involved, it is immaterial whether a person chooses to refer to or regard himself as a partner for the reason that it is the substance, not form, of an arrangement which determines if a partnership exists. Where labor and management expertise existed in and was contributed by Shillman, who conceived the idea of a partnership business, procured the contributions

of other parties, exercised absolute authority regarding the operation of the partnership business, including the receipt and expenditure of partnership funds, with the expectation of sharing in profits, if any, Shillman will be deemed a member of said partnership where the rights of third parties are involved.

3. Corporations - Where an Ohio corporation was organized without adequate capitalization and was thereafter not treated as a corporation by parties in interest except for the purpose of being employed as a cloak for the evasion of partnership obligations and to otherwise work injustice, the separate personality of the corporation was disregarded and it was treated as an association of persons.

4. Resource Conservation and Recovery Act (hereinafter "RCRA" or "the Act") - Parties - Assessment of Civil Penalty - Though not technically a party- Respondent named in subject Complaint, David B. Shillman was bound as a party because of his direct connection with the named Respondent's interest, by his individual interest in the result of a hearing held to determimine liability for civil penalties under the Act, and by his active participation in the preparation and presentation of the defense presented at said hearing. By such participation, Shillman entered his appearance as a party and there was no need or necessity to amend subject Complaint to make Shillman a new party or to serve him with a copy of said Amended Complaint as he was already a party appearing in the case by Counsel.

5. RCRA - Pleadings - Where the proceedings contemplated by an Amended Complaint are identical to those under the Original Complaint in that the forum and the parties are the same and said Complaints raise identical issues, it is proper to take official notice of the Answer filed, including judicial admissions, to the Original

Complaint as it is well established that facts which are a part of a court's public records of prior litigation, closely related to the instant case, are facts of which a court will take judicial notice, and such notice may be taken ex mero motus or sua sponte. 40 CFR 22.22(f) provides that official notice may be taken of any matter judicially noticed in the Federal Courts.

6. RCRA - A prima facie case was made out that hazardous waste was on the site operated by J.V. Peters and Company when Complainant introduced exhibits which were a notification and Part A permit application filed by David B. Shillman for and on behalf of subject partnership, pursuant to the provisions of 42 USC Sections 6930(a) and 6925(e), respectively, which notified the U.S. EPA of the location and general description of said hazardous waste activity, along with a description of the identified or listed hazardous wastes so handled by said J.V. Peters and Company. 40 CFR 22.24 provides that following the establishment, by Complainant, of a prima facie case, Respondent shall have the burden of presenting and of going forward with (its) defense.

7. RCRA - Unless specific reasons exist for an increase or decrease, the amount of the penalty recommended to be assessed in the Complaint is the appropriate amount to be assessed. Where Complainant's evidence showed that the penalty recommended accorded with the criteria set forth in the Act, and that applicable civil penalty guidelines had been utilized along with consideration of whether mitigating or aggravating factors existed, there was no justification for the assessment of a penalty different in amount from that recommended in the Complaint (40 CFR 22.27[b]).

INITIAL DECISION

On January 31, 1984, subject "Amended Complaint" was filed by the United States Environmental Protection Agency (hereinafter "EPA", "the Agency" or "Complainant") against J.V. Peters and Company, Incorporated (hereinafter "Respondent" or "J.V. Peters"). The record reflects that the previous or original Complaint was filed by Complainant on April 17, 1981, and alleges the same findings from an inspection on December 17, 1980, and the identical charges of non-compliance by Respondent, in violation of specific sections of the Code of Federal Regulations (hereinafter "CFR") and the Ohio Administrative Code (hereinafter "OAC"). The original Complaint proposed assessment of a civil penalty of $10,000. The original Complaint was withdrawn without prejudice by Complainant, pursuant to 40 CFR 22.14(e) on September 19, 1983, after Motion for Leave to so Withdraw was granted. Respondent, by its attorney Brent L. English, filed Respondent's Answer to subject "Amended Complaint" and Respondent's Request for Hearing on March 1, 1984. Said hearing, requested by Respondent, was scheduled to be held in Chicago, Illinois, on June 19, 1984. On June 5, 1984, Respondent filed its Motion requesting that said hearing be moved to the greater Cleveland area for the reason that Respondent was financially unable to bear the expense attendant to a hearing in Chicago. Said Motion was granted by the undersigned and the date of hearing was continued to a date to be set.

On June 30, 1984, Respondent filed its Motion for Additional Discovery. On July 24, 1984, my Order granting the Discovery (due to Complainant's failure to respond to said Motion) was issued along with the directive that the requested hearing would be heard in the Cleveland, Ohio, area beginning on September 18, 1984, and that the precise location of same would be later advised. Complainant's

Response to Respondent's Motions to Move the Hearing and for Additional Discovery were received by me on July 25, 1984. Respondent responded to Complainant's said Responses on July 27, 1984. On September 4, 1984, I received a Motion from Complainant requesting that the hearing scheduled for September 18, 1984, be continued and that Counsel be granted more time to "complete discovery", due to serious illness in the family of Complainant's Counsel. The time for hearing on the basis of the Motion was continued to October 3, 1984; however, because Respondent Counsel was unavailable on October 3, 1984, said hearing was reset to begin on October 23, 1984, in the Moot Courtroom, Room 101, at the Cleveland-Marshall College of Law in Cleveland, Ohio. The first day of hearing was completed at said location and then the hearing was moved to 118 Mall Building, Room 401, in Cleveland, Ohio, where it was completed on October 24 and 25, 1984.

Subject Amended Complaint alleges that Respondent, at its hazardous waste site located at 17030 Peters Road, Middlefield, Ohio, violated Subtitle C of RCRA s300s 42 USC 6924, and implementing regulations and hazardous waste rules 40 CFR Part 265 and parallel sections of OAC Chapter 3745, in the following particulars, to wit:

1. The owner/operator did not obtain a detailed chemical and physical analysis of representative samples of waste prior to its treatment, storage and disposal, and thus violated 40 CFR 265.13(a)(1).

2. At the time of subject inspection, the owner/operator did not provide a written analysis plan for hazardous waste stored on subject site, and thus violated 40 CFR 265.13(b).

3. Respondents violated 40 CFR 265.14(b) by failing to install either a barrier around the active portions of the facility or 24-hour surveillance.

4. Respondents violated 40 CFR 265.14(c) by failing to post signs bearing the legend "Danger-Unauthorized Personnel Keep Out" at each entrance to the facility.

5. Respondents violated 40 CFR 265.15(b) and (d) in failing to create and maintain at the facility a written inspection schedule and log.

6. Respondents violated 40 CFR 265.16(d) by failing to create and maintain at the facility personnel records which list the job titles and describe the type and amount of continuing and introductory training provided to each hazardous waste management person.

7. (a) Respondents violated 40 CFR 265.32(a) by failing to have installed an internal communications system or alarm capable of providing emergency instruction to facility personnel.

(b) Respondents did not maintain at the facility a telephone capable of summoning emergency assistance and, therefore, violated 40 CFR 265.32(b). [FN1]

(c) Respondents violated 40 CFR 265.32(c) by failing to maintain adequate fire extinguishers, spill control and decontamination equipment at the facility.

(d) Respondents violated 40 CFR 265.32(d) by failing to have available at the facility water at adequate volume and pressure, or foam-producing equipment, automatic sprinklers or water spray systems.

8. Respondents violated 40 CFR 265.34(a) by failing to have accessible, whenever hazardous waste was being mixed, poured or otherwise handled, an internal alarm or emergency communication device either directly or through visual or voice communication with another employee.

9. Respondents violated 40 CFR 265.35 by failing to maintain aisle space to allow unobstructed movement of personnel, fire control equipment, spill control equipment and decontamination equipment to any area of the facility operation in an emergency.

10. Respondents violated 40 CFR 265.37 in that they had failed to make any arrangements with appropriate state and local emergency response officials.

11. Respondents violated 40 CFR 265.51 through 265.56 in that they failed to create, maintain and follow a contingency plan for the facility.

12. Respondents violated 40 CFR 265.73 by failing to create and maintain at the facility a written operating record.

13. Respondents violated 40 CFR 265.74 in failing to make available, on request and at all reasonable times, all required records.

14. Respondents violated 40 CFR 265.173(a) in failing to maintain containers of hazardous waste, not being handled or processed, in a closed condition.

15. Respondents violated 40 CFR 265.176 by storing containers of flammable hazardous waste within 15 meters (50 feet) of the property line of the facility.

16. Respondents do not have a permit from the State of Ohio to operate said hazardous waste facility.

17. Respondents violated 40 CFR 265.110 through 265.115 by failing to have and to activate a closure plan for the facility.

18. Substantial quantities of hazardous waste remain on said site in tanks and other containers.

Respondent's Answer to the Amended Complaint generally denies the violations charged except for Complainant's statement that all operations as a hazardous waste management facility at subject location have ceased and Respondent has abandoned any intention to resume said operations, and that Respondent has not followed the closure procedures as required by 40 CFR 265.110 through 265.115; and that substantial quantities of hazardous waste remain on the facility in tanks and other containers.

Respondent's Answer to the Original Complaint responds to the charges numbered and referred to in the Complaint as "Findings" as follows:

1. Respondent had, at the time of said inspection, obtained chemical and physical analyses to some, but not all, of the waste stored at subject facility.

2. Admits that Respondent was unable to provide a written analysis plan at the time of the inspection, but states that the Inspecting Officer did not then request production of such written analysis plan. [FN2]

3. Admits that there was not, on and prior to December 17, 1980, any 24-hour surveillance or a fence completely surrounding the facility, but states that a 24-hour surveillance system was provided effective December 20, 1980. [FN3]

4. Admits that it did not post a sign at each entrance with the legend "Danger - Unauthorized Personnel Keep Out", but states that a "No Trespassing" sign was at the entrance to Respondent's facility at the time of the subject inspection.

5. Admits that Respondent was not then able to produce a written inspection schedule and log, but that same was not requested by the Inspecting Officer. [FN4]

6. Admits that Respondent could not then provide to the Inspector the documents and records required by regulation, i.e., job descriptions and a written description of introductory and continuing training to be given each waste management person there employed, but states that the Inspector did not then request production of same. [FN5]

7. (a) Admits the absence of internal communications or alarm systems but avers that, because of the size and physical arrangement of Respondent's facility, such equipment is not essential to the safety of its personnel, and

(b) A telephone was at all times available for the purposes set forth in 40 CFR 265.32(b). [FN6]

(c) States that fire extinguishers [FN7] were available but neither admits nor denies the absence of required fire control, spill control and decontamination equipment.

(d) Admits that facility did not have a water supply available but avers that it is entitled to a variance from the requirements of s265.32(b) because the Middlefield Fire Department maintains equipment for transporting water to fire scenes and that Respondent's site is in a rural area and over one-fourth (1/4) mile from other structures.

8. Respondent denies that all personnel did not have immediate access to an alarm system or emergency communication device either directly or through visual or voice contact with another employee.

9. Respondent denies that it failed to maintain aisle space as required by 40 C.F.R. 265.35.

10. Admits that it failed to make arrangements with state and local emergency response officials but states that its efforts to enlist said assistance and cooperation was unsuccessful.

11. Admits that a contingency plan was not then available but states that the Inspector did not request same.

12. Admits that a written operating record could not then be produced by Respondent as required by s265.73 but states that such production was not requested by the Inspector.

13. Restates the answers given to Paragraphs 1 through 12, supra, and states that subject required records were not requested.

14. Denies the allegation that containers containing waste were not closed.

15. Admits that Respondent stored containers holding ignitable and reactive waste in an area less than 15 meters (50) from the property line and states that, because the parcel containing the facility has an east-west dimension (width) of only 120 feet, literal enforcement of s265.176 would result in confinement of material storage to a 20-foot-wide corridor in the center of said parcel, and Respondent is entitled to a variance from said regulatory provision.

Respondent, in its Answer to the Original Complaint, put forth seven Affirmative Defenses, to wit:

I. The subject inspection in December, 1980, took place less than one month after the effective date of the regulations.

II. Although Respondent was then in violation of recordkeeping requirements, it has at all times substantially, though not strictly, conformed to regulatory requirements concerning chemical and physical analysis of representative waste samples, procedures required by a general waste analysis plan, providing training to employees and provided, maintained and inspected emergency or contingency equipment which would properly be required by a contingency plan.

III. Respondent's operations have been conducted to avoid damage to the environment; no chemical wastes have been spilled,

dumped or buried and no pollutants have been permitted to leave said facility.

IV. Any actual or potential hazard has not been increased by Respondent's non- compliance with said regulations.

V. By reason of (large) quantity of wastes and local weather conditions in November and December, 1980, a transition period was required in order to achieve full compliance with waste analysis requirements and other provisions of the regulations. [FN8]

VI. Because of the size of subject facility, the proposed civil penalty is not warranted.

VII. Subject inspection was conducted in bad faith . . . and to entrap (Respondent) and to exaggerate the extent of . . . violations.

I shall in this case take notice of the Answer, filed by Respondent J.V. Peters and Co., Inc., to the Original Complaint previously filed herein. It is well established that facts which are a part of a court's public records of prior litigation, closely related to the instant case, are facts of which a court will take judicial notice (Insurance Co. of North America v. National Steel Service Center, Inc. [DC W. Va., 1975] 391 F.S. 512, 1.c. 518 [4], affirmed 529 F.2d 515; Chandler v. O'Bryan, [DC OK, 1969], 311 F.S. 1121, 1.c. 1122[3]). Where, as here, the proceedings are in the same forum, concerning the same parties and the Original and Amended Complaints raise identical issues, I may take judicial cognizance of my own records and act ex mero motu or sua sponte (in re Dunn [DC GA, 1966] 251 F.S. 637; Baldwin v. Local 843, International Brotherhood of Teamsters [DC NJ,

1982], 562 F.S. 36, 38[1], citing Welles v. U.S., 318 U.S. 257, 63 S.Ct. 582 [1943]).

I have set forth, supra, the content of the Answer filed on May 12, 1981, to said Original Complaint, by David B. Shillman, attorney for and President of Respondent J.V. Peters & Co., Inc. Mr. Shillman was manager with complete authority over subject facility and its operation on June 1, 1980 (when the business began as a partnership), at the time of its incorporation on January 27, 1981, and at all pertinent times subsequent thereto (TR 430-437; 508).

Concerning the issues unresolved and based upon the record, including the testimony elicited and exhibits received at the hearing held herein, I make the

FINDINGS OF FACT

1. J.V. Peters and Co. was a partnership, prior to formation of said J.V. Peters and Co., Inc., on January 30, 1981, and began doing business on June 1, 1980 (TR 432), at its facility at 17030 Peters Road, Middlefield, Ohio.

2. Said partnership business consisted of picking up, transporting and collecting, at subject site, spent industrial solvents which were disposed of, usually by sale, to a user or "reclaimant" (TR 433); David B. Shillman maintained control of what materials were received at subject hazardous waste site (TR 472).

3. The business of the corporation was the same as that of its predecessor partnership (TR 433). Correspondence after January 30, 1981, was on the "partnership" stationery and David B. Shillman signed

as President of J.V. Peters and Company (see, e.g., Respondent's [hereinafter "R"] Exhibit [hereinafter "EX" 8, 9 and 10) with no indication of the existence of said corporation.

4. At the time of the partnership's formation, on or about June 1, 1980, and at all pertinent times subsequent thereto, David B. Shillman has exercised complete authority over subject operation, representing himself as secretary- treasurer of the partnership and as president of said corporation (TR 432).

5. The site of the subject operation was two acres on which David B. Shillman individually procured a lease, with option to purchase, in May, 1980, when Shillman formulated his intention to start said operation and to organize people who would help him so engage in said business (TR 549-550).

6. Said partnership, known as J.V. Peters and Co., was formed subsequent to procurement by Shillman of said lease and prior to commencement of business. Shillman testified (TR 550) that Dorothy L. Brueggemyer and John Vasi were partners.

7. The entire capitalization of the partnership, $25,000, was contributed by Mrs. Brueggemyer, and was used to purchase initial equipment including paints, pumps, trailers and fire extinguishers and for a $1100 deposit required in procurement of said lease (TR 551, 552). Mrs. Brueggemyer had had no past experience or connection with the hazardous waste business.

8. Shillman, in August, 1980, filed a notification of hazardous waste activities and, on September 4, 1980, filed a Part A application for a permit (Complainant's [hereinafter "C"] EX 4); Shillman signed

the letter of transmittal, notification and said Part A application on behalf of J.V. Peters Company as its Secretary-Treasurer.

9. After organization of J.V. Peters Company, Incorporated, the directors of the the corporation first met on February 2, 1981, when David B. Shillman was elected Chairman of the Board and President of the corporation. At said meeting, said Dorothy Brueggemyer, Angelo I. Colon (described as plant supervisor [TR 478]) and Robert P. Warner were elected directors. Other officers elected were Angelo I. Colon, Vice President, and Dorothy L. Brueggemyer as Secretary and Treasurer. At said meeting, the corporation, by resolution adopted, entered into an Employment Agreement whereby David B. Shillman was to serve as President and Chief Executive Officer and receive compensation equal to 20% of the net profits of the corporation. A further resolution, proposed by Shillman, authorized him, acting alone, to withdraw funds from the corporate bank account and to borrow money, acting concurrently with the Secretary (R EX 11).

10. In March, 1981, David B. Shillman was charged by the State of Ohio with operating a facility without a permit (TR 453).

11. Shillman hired security guards on December 20, 1980, who were kept at the facility until the summer or fall of 1981, when he no longer had money to pay the guards (TR 448). His stated reason for not installing a fence pursuant to regulations was that "we didn't have title to the property" (TR 453). Shillman later acquired title to subject site from a trustee in bankruptcy in the name of the corporation (TR 454). The lease option agreement contracted by Shillman individually (TR 550) was never consummated (TR 454).

12. When served with the original EPA Complaint, on behalf of the corporation, Shillman first filed an Answer to said Complaint and, second, requested a hearing and made an appointment to meet with EPA personnel in Chicago (TR 456) to "find out what the Agency wanted me to do" to achieve compliance with regulations and to make arrangements with them that "I would do whatever they wanted me to do that the regulations required" (TR 457), after which he made contact by letter with the hospital, sheriff and fire department and contracted with an engineering firm for the services of Ed Fritz, R.P.E., and, with the engineer, prepared a technical response document (C EX 3).

13. Said technical response document and a supplement thereto (R EX 6) were prepared by his attorney in conjunction with said engineer, at Shillman's direction (TR 462), as were Part B applications later submitted (R EX 7A, B, C and D; TR 464).

14. At the hearing, the "present assets" of the corporation consisted of three pumps and a $5000 cash deposit that had been "filed with Geauga County Clerk"; its liabilities totaled "many thousands of dollars", including cost of litigation and substantial liability to customers - because of "our inability to complete the disposal of drums" which (Respondent) was obligated to dispose of (TR 501, 502).

15. The Articles of Incorporation, dated January 27, 1981, and approved by the State of Ohio on January 30, 1981, provided for the issuance of 500 shares of common stock without par value. The corporation purported to begin business with $500 cash (R EX 11; TR 430-31).

16. Robert P. Warner resigned as director on March 18, 1983 (when the corporation was indebted to him). David Shillman and

Angelo Colon were then described as "surviving directors". Dorothy Brueggemyer was elected as director to fill the vacancy created by Warner's resignation (Corporate Minutes, March 18, 1983; R EX 11).

17. Operations at the Peters Road facility ("the facility") involving the treatment and storage of industrial waste began at least as early as June, 1980 (TR 26-38; 432).

18. Both prior to and during the entire period from June, 1980, to May, 1981, materials falling within the definition of hazardous wastes set forth in 40 CFR 261 were transported to and from, handled at, treated and stored at the facility (C EX 4, 11, 12, 13, 15; TR 537-540, 540, 543-46, 547-8; R EX 17; TR 510, 512-14).

19. The facility was closed by Order of the Geauga County Court of Common Pleas in May, 1981, under a temporary restraining order based, inter alia, on the facility's failure to have a permit from Ohio EPA for operating a hazardous waste facility (TR 440; 542-3).

20. After the facility was closed by Order of Court, hazardous wastes continued to be stored on the facility (TR 568; R EX 7-C [page 4a, Table One]).

21. David B. Shillman, a graduate of Harvard Law School, knew at least as early as August 21, 1980, that the operations at the facility would be subject to the hazardous waste rules. Shillman was personally engaged in the business of treating and storing hazardous waste, and he exercised complete control and authority over operations at the facility (TR 431-3, 555, 604).

22. David B. Shillman understood that, with the filing of the RCRA Part A application and notification of hazardous waste activities,

the facility received interim status and was subject to the hazardous waste rules (TR 555- 6).

23. At some time between the execution of the said lease-option agreement and the commencement of operations at the facility, David B. Shillman formed a partnership with John Vasi and Dorothy Brueggemyer, doing business as J.V. Peters and Company (TR 432-3).

24. David B. Shillman had overall responsibility for and managed the operations at the facility, and represented himself as Secretary-Treasurer of J.V. Peters and Co. during the period prior to January 27, 1981, and subsequently had overall responsibility for and managed the operations at the facility and represented himself as President of J.V. Peters and Co., Inc. (R EX 7; TR 432, 508; C EX 4; R EX 7 A-D).

25. The purpose of the partnership, and later the corporation, was to transport and collect spent solvents and other industrial waste materials at the facility for mixing and resale or disposal (TR 432-3, 514-5; C EX 4).

26. David B. Shillman testified that, on or about January 30, 1981, the partnership transferred both its assets and liabilities to a newly-formed corporation, J.V. Peters and Co., Inc., and that he understood that whatever status the facility had with respect to approval to store or treat hazardous waste would pertain to the facility after the formation of the corporation (TR 556-8).

27. U.S. EPA and Ohio EPA were never given formal notice of the change of ownership prior to its undertaking, as required in 40 CFR 270.72(d) (TR 557- 8).

28. The operations at the facility were continued under the new name, without change in those operations (TR 433, 553; C EX 1).

29. John Vasi sometimes acted for J.V. Peters and Company, and represented himself as President of said partnership, from formation of the partnership until around December, 1980, or when his connection with the operation was terminated. Vasi's primary function was to cook meals for the workers at subject site (TR 52, 441, 553; C EX 1 and 5).

30. David B. Shillman was and is President of J.V. Peters and Company, Inc. (C EX 16; TR 430).

31. Melinda Becker was an employee of Ohio EPA from June of 1978 until mid- 1983, and was a field inspector who conducted inspections to determine compliance with the Interim Status Standards under the RCRA Act beginning on November 19, 1980 (TR 31, 35).

32. Ms. Becker first visited the facility on or about July 7, 1980 (TR 36).

33. Ms. Becker again visited the facility on or about November 4, 1980, in the presence of David B. Shillman and John Vasi, and told Shillman at that time that she was concerned that the RCRA regulations were about to become effective and there had been no apparent attempt to bring the facility into compliance with the regulations, including the requirement for a fence (TR 117-8).

34. David Shillman stated that his reason for not installing a fence was that he did not own the property and therefore did not want to make improvements on it (TR 567).

35. On November 10, 1980, Ms. Becker sent a letter to John Vasi, as a follow- up to the November 4, 1980, inspection, requesting information on the waste treatment processes and noting concerns about the large number of drums accumulated on-site since the previous inspection, and that no apparent efforts had been made to comply with the Interim Status Standards to become effective November 19, 1980 (C EX 5).

36. After the effective date of the RCRA regulations (November 19, 1980), but before the date of the December 8 and 17, 1980, inspections, a cooperative agreement existed between Ohio EPA and U.S. EPA, under which Ohio EPA personnel would perform RCRA compliance inspections, including the inspections of the facility, as agents of the U.S EPA (TR 35-67, 337).

37. Ms. Becker went to the facility on December 8, 1980, to conduct an inspection to determine compliance by the faciity with the Interim Status Standards under 40 CFR 265. This inspection was the first of 40 to 45 conducted by her at facilities in northeast Ohio to determine interim status compliance and was conducted in a manner not materially different from subsequent inspections (TR 36, 39, 304-5).

38. The facility was selected for inspection because of concerns the Ohio EPA had about the site based on prior inspections (TR 401).

39. Complainant's Exhibit 1 is a true and correct copy of the inspection form filled out by Ms. Becker contemporaneously with her inspections on December 8 and 17, 1980 (TR 44, 141).

40. Ms. Becker was, during the month of December, 1980, the only Interim Status Standards Compliance Field Inspector in the

Northeast District Office of the Ohio EPA, and was responsible for the conduct of such inspections in the 15 counties around that office, including Geauga County (TR 304-5).

41. During Ms. Becker's visit to the facility on December 8, 1980, the only person on the facility was Mark Brostek, who held himself out as manager of the facility and was unable to produce or locate any of the documents sought by Ms. Becker to determine compliance with the Interim Status Standards, or to contact David Shillman by telephone (TR 50-51).

42. On December 9, 1980, John Vasi, who presented himself as President of J.V. Peters and Co., came to the Ohio EPA's offices and requested that the inspection of the facility be redone because he felt the December 8, 1980, inspection was not representative (TR 52, 123).

43. On December 17, 1980, Ms. Becker again inspected the facility in the presence of John Vasi, David Shillman and Angelo Colon (TR 63-4).

44. During the course of the December 17, 1980, inspection, Ms. Becker asked to see a detailed physical and chemical analysis of waste materials handled at the facility, and was told that no such document, which is required by 40 CFR 265.13(a)(1), existed on that date (TR 53).

45. David Shillman admitted that no such document had been prepared, and that the facility relied on analysis conducted by customers who purchased material from Respondents and, to a lesser extent, by generators of the material and on field tests, including

specific gravity, smell and a "copper wire test" (TR 515-16, 519, 606, Original Answer p1).

46. During the course of the December 17, 1980, inspection, Ms. Becker asked to see documents that would evidence a written general waste analysis plan for the wastes handled at the facility pursuant to 40 CFR 265.13(b), and was told that no such document existed on that date. David Shillman admitted that no such document had been prepared, and stated that they relied on analyses produced by generators and by persons to whom they sold hazardous wastes (TR 56, 606, Original Answer p2).

47. During the course of the December 17, 1980, inspection, Ms. Becker observed that no fence or other barrier had been installed around the facility, as required by 40 CFR 265.14(b), and subsequently was informed that a security guar was posted from three days after the December 17, 1980, inspection until late May, 1981 (TR 475; R EX 7C, pp. 6-7; C EX 3, p. 4; TR 563-567).

48. Said guard was removed after the facility had been barred from operating by a temporary restraining order issued by the Geauga County Court of Common Pleas in May, 1981, and no fence was ever installed around the facility because David Shillman or the Company did not have title to the site and thus did not want to spend money for such improvements on the facility (R EX 7B, page 6; Original Answer p3; TR 448).

49. During the course of the December 17, 1980, inspection, Ms. Becker observed that there were no signs reading "Danger - Unauthorized Personnel Keep Out", as required by 40 CFR 265.14(c), posted at each entrance to the facility (TR 60; Original Answer p4).

50. Such signs were not posted until May 14, 1981, even though Ms. Becker discussed the requirement for their presence with David Shillman on December 17, 1980 (TR 249-50; C EX 9).

51. During the course of the December 17, 1980, inspection, Ms. Becker asked to see documents evidencing the existence of a written inspection schedule and log for the facility, as required by 40 CFR 265.15(b) and (d), and was shown no such documents and told they did not exist. David Shillman admitted that such documents did not exist on that date (TR 64-8, 566; Original Answer p5).

52. During the course of the December 17, 1980, inspection, Ms. Becker asked to see written personnel records that list the job titles and provide job descriptions for each position related to hazardous waste management, together with a written description of the type and amount of introductory and continuing training given to each hazardous waste person, as required by 40 CFR 265.16(d). She was told that no such documents existed at the facility, and David Shillman admitted that no such documents existed on that date (TR 70, 566-7; Original Answer p6).

53. The written job titles and job descriptions, and records of personnel training required by 40 CFR 265.16(d), were not prepared until several months after the inspection (C EX 3, p. 5).

54. A telephone was available at the facility both at the time of the December 1980, inspection and thereafter, at least through 1981 (TR 22).

55. No internal alarm or communications system capable of providing immediate emergency instruction to personnel was ever

installed at the facility, as required by 40 CFR 265.32(a), and David Shillman admitted that a person inside the building and the facility could not easily hear a person outside the building (TR 80-81, 266, 601).

56. The facility consists of approximately two acres, with dimensions of approximately 120 by 720 feet with the long dimension north and south. It is located in an agricultural area in flat terrain and has on it a wooden pole barn (C EX 9; R EX 7A-D).

57. Cattle have grazed within five feet of the property line of the facility, and crops have been grown directly adjacent to the east and west property lines. Access and egress can easily be had from any direction, and evidence of livestock entry has been seen on the facility (TR 243-46; R EX 7B, "Contingency Plan", page 5; TR 476).

58. On the facility were two 20,000-gallon steel tanks of dimensions 10 x 34 feet, one of which was used for the mixing of hazardous wastes in the form of waste solvents, and the other of which was used to contain water contaminated with hazardous wastes that was delivered mixed with the referenced solvents (R EX 7C, p. 3).

59. Flammable wastes were originally stored inside the building on the facility, but were removed to tanks on a diked pad at the rear of the building after the Fire Marshall of Geauga County filed suit to force their removal due to fire code violations (TR 570-71).

60. On the date of the December 17, 1980, inspection and subsequently, there were seven portable hand-held and one-wheeled foam-producing fire extinguishers on the facility (TR 484, 568).

61. There was no well or public water-supply available at the facility at any time (R EX 7B, p. 8; Original Answer p7[d]; TR 568).

62. Other than said fire extinguishers, there was no equipment at the facility to produce fire-fighting foam or water hose streams, and Respondents proposed that the availability of a volunteer fire department and the presence of a lake approximately 1/4 mile away satisfied the requirements of 40 CFR 265.32(d) (TR 444; Original Answer p7[a]).

63. Respondent admits that said equipment is inadequate to deal with other than small ground fires, and the contingency plan submitted over Shillman's signature as part of R EX 7C admits that such equipment could not control a conflagration, which might, as set forth in such contingency plan, be simply allowed to burn itself out (C EX 13, p. 9; R EX 7C, "Contingency Plan", pp. 9- 10; TR 92-94).

64. At the time of the December 17, 1980, inspection, drums of hazardous waste were stored with aisle space considered inadequate to meet the purposes of 40 CFR 265.35, as there was but one major aisle space (down the center of the building) sufficient to accommodate spill and fire equipment (TR 94-98, 273-4, 487-8).

65. At the time of the December 17, 1980, inspection, the facility had no internal alarm or communication device immediately available to all personnel to allow communication between all such personnel involved in the pouring, mixing or handling of hazardous wastes, consistent with the requirements of 40 CFR 265.34(a), and none was subsequently subsequently installed (TR 80-81, 266, 601, 94, 567-8).

66. Among other operations carried out at the facility, hazardous wastes were handled during the unloading of trucks into the building, there was movement of drums of waste around the facility and reloading onto other trucks for shipment to customers (R EX 7C, p. 7; TR 488-9).

67. Hazardous wastes were mixed at the facility by being pumped into one of the 20,000-gallon bulk storage tanks on the facility (R EX 7C, p. 2-3).

68. At the time of the December 17, 1980, inspection, no attempts had been made to make, consistent with the requirements of 40 CFR 265.37, any arrangements with the appropriate state and local officials to familiarize them with the layout of the facility, the properties of and hazards associated with the materials handled, location of work stations, evacuation routes, or contact with hospitals relating to the properties of materials handled at the facility and types of injuries that might occur (TR 99; R EX 8, 9, 10, 13; Original Answer p10).

69. David Shillman admitted at the time that such arrangements would be a good idea, but no efforts were made to contact emergency response or other local authorities until May 26, 1981 (TR 99; R EX 8, 9, 10, 13; TR 594).

70. At the time of the December 17, 1980, inspection, no contingency plan had been prepared for the facility (TR 100, 102, 595; Original Answer p11).

71. The contingency plan ultimately submitted as part of the Part B application for the facility on or about November 24, 1981, was

inadequate in at least two respects: an appropriate emergency coordinator was not identified, and the egress provisions merely had personnel running off the site in all directions in case of an emergency (TR 101, 102).

72. At the time of inspection, there was no written operating record, consistent with the requirements of 40 CFR 265.73, maintained or available at the facility, or in existence (TR 566, 102-103, 104-105; Original Answer p12).

73. At the time of the December 17, 1980, inspection, none of the records and plans required under the Interim Status Standards were available at the facility or presented, upon request, to Ms. Becker in her capacity as representative of the U.S. EPA, even though Ms. Becker went with Shillman to his office specifically to see any such documents (TR 225-7).

74. The State of Ohio sued J.V. Peters and Company in April, 1981, seeking an injunction against further operation of the site until an appropriate state permit was obtained (TR 452-3).

75. At some time in May, 1981, the State of Ohio obtained a temporary restraining order shutting down the facility until such permit was obtained. This order was subsequently modified to allow and require the defendants to remove the waste materials from the facility (TR 212, 215, 326).

76. On December 17, 1980, some hazardous waste containers, that were being processed, were in an open condition. Other containers in storage were closed, as required by 40 CFR 265.173(a) (TR 107-8).

77. Subsequently, Ms. Becker observed barrels of hazardous waste on the facility that were "closed" only in the sense that a piece of plywood or plastic lawn bags had been placed over the open ends, and also observed barrels completely or almost "rusted out" (TR 108-9).

78. On December 17, 1980, the operators of the facility had stored drums containing flammable waste within 15 meters or 50 feet of the property line (C EX 10; Original Answer p15; TR 111).

79. Flammable hazardous waste had been received at the site prior to the December 17, 1980, inspection (C EX 11, 12; R EX 17).

80. On December 17, 1980, there was no way to determine, from an examination of records maintained at the facility or prepared by the operator, the contents of drums located at various points around the facility (TR 506-8).

81. In May, 1981, David Shillman attended a compliance conference with representatives of the U.S. EPA in Chicago, at which time he admits stating that confining storage of flammable hazardous wastes to the small area legally available at the facility was impracticable (TR 562).

82. On November 10, 1980, and on January 14, 1981, the Ohio EPA sent letters to John Vasi, as President of J.V. Peters and Co., first describing observations on November 14, 1980, and next with a copy, as an attachment, of the inspection report prepared by Melinda Becker relating her observations on December 8 and 17, 1980 (C EX 1 and 5).

83. David Shillman acknowledged receipt of said letters in the course of busines (TR 440-41; C EX 6).

84. In September, 1983, the U.S. EPA spent money from the federal Superfund to remove and dispose of the drums and bulk fluids of hazardous waste left on the site by the operator (TR 364; Response of Counsel to Order of ALJ, dated April 12, 1984, p. 2, pp 17, 18).

85. Dr. David Homer is an expert with respect to the coverage and requirements of the hazardous waste rules in 40 CFR, and was assigned to the duty of writing the final hazardous waste permit for subject facility (TR 327-331).

86. Respondent submitted six documents for review by the U.S. EPA and the State of Ohio for purposes of seeking a "Part B" final hazardous waste permit under 40 CFR Part 264 (R EX 6 and 7, A, B, C and D; C EX 3).

87. None of said Part B permit applications for a permit were sufficiently complete to satisfy the requirements of the hazardous waste rules governing the issuance of hazardous waste permits (TR 333).

88. In considering the penalty to be assessed against the facility, Dr. Homer considered both mitigating and aggravating factors, including the fact that the operator was not actively doing business and the lack of efforts to subsequently comply with the Interim Status Standards, including maintaining records reflecting the character and extent of hazardous waste in storage (TR 368-70).

89. Dr. Homer applied the penalty policies established by U.S. EPA in 1980 in formulating the penalty assessed in this action (TR 344-5).

90. The penalty proposed by Dr. Homer, prior to reductions for mitigation, experience and purposes of consistency, is $70,675 to $79,675 (C EX 8; TR 345).

91. The submissions made by Respondent operator in the form of a technical submission, a supplement thereto, and four Part B applications, did not correct man of the deficiencies noted dur'ng the inspections, especially the continued lack of site security through fencing or guard service, a proper physical and chemical analysis, and a proper waste analysis plan (TR 372, 377, 379, 383-4).

92. On December 17, 1980, there was present on the site a quantity of Sorball, a commercial product used to absorb spilled material (TR 124-5).

93. At the time the facility ceased operations, there were by its count some 1572 drums of hazardous waste on site (R EX 7C, pp. 4-5, Table One).

94. Nearly half of said drums contained flammable materials, both solid and liquid (R EX 7C).

95. Respondent admitted that certain wastes on the site could not be reclaimed or sold but must be disposed of by landfilling or inciner tion, and proposed to store such materials until the operations at the site generated cash to pay for such disposal (R EX 7C).

96. Under the Court Order closing the facility, issued in May, 1981, the Respondents were required to allow Ohio EPA to inspect the facility at any time (TR 301-3).

97. On July 3, 1981, Ms. Becker attempted to go on the facility to check compliance with the Court Order closing the facility and was denied access by David Shillman (TR 214, 215).

98. In November, 1982, Ms. Becker attempted to conduct a follow-up Interim Status Standards inspection at the facility by prearranged agreement with David Shillman, who did not appear on that date at the facility (TR 68).

99. David Shillman stated that the reason the documents he claimed to exist in December, 1980, that responded to the requirements of 40 CFR Part 265, were no longer in existence is that they were the type that get "dirtied up" and were probably thrown away (TR 601-604).

100. Though not of major proportions, there were spills of hazardous waste on the facility (TR 576).

101. Respondent did not activate a closure plan for the facility, despite having been out of business and acknowledging its intent to abandon the facility because of the continuing injunction applicable to their operations (TR 335, Response to Order of ALJ, April 12, 1984).

102. Substantial quantities of hazardous waste remain on said site in tanks and

CONCLUSIONS OF LAW

1. David B. Shillman, even though not technically a party Respondent herein, was and is so directly connected with the Respondent interests by his individual interest in the result and by his

active participation in the case as to be bound as a party Respondent herein and the assessment of a civil penalty against David B. Shillman, severally and jointly with his partners, if any, is appropriate (See Conclusion 2, infra, and cases cited).

2. For the reason that the Counsel for Respondent was retained and professional advisors were employed by David B. Shillman to protect interests which were, in fact, the interests of Shillman, and whereas Shillman was the moving party in preparing the defense offered herein and participated in presentation of said defense by his appearance to testify in support of said defense, Shillman entered his appearance as a party herein and there was no need or necessity to issue a summons for him or to amend pleadings to make Shillman a new party as he was already a party appearing in the case by Counsel (Ocean Accident and Guarantee Corp., Ltd. v. Felgemaker et al., 143 F.2d 950, 952[2] [CCA, 6, 1944]; 47 F.S. 660, 663[5]).

3. On this record, it is clear that the Ohio Corporation J.V. Peters and Company, Incorporated, was organized without adequate capital to be employed as a cloak for the evasion of obligations and to work injustice, that is, to shield David B. Shillman from his liability for civil penalties provided by the Act to be assessed against him for violations of regulations promulgated pursuant to the Act, and that the separate personality of said corporation should and will be disregarded and said corporation will be treated as an association of persons (Mull v. Colt Co., 31 F.R.D. 154, 166 [1962]; see also DeWitt Truck Brokers, Inc. v. Flemming Fruit Co. et al., 540 F.2d 681, 685[10] [USCA, 4th Cir. 1976] and West v. Costen, 558 F.S. 564, 585[44] [1983]).

4. A partnership is generally said to be created when persons join together their money, goods, labor or skill for the purpose of

carrying on a trade or business and where there is a community of interest in the profits and losses resulting from such effort. David B. Shillman, by his contribution of labor and management expertise, whereby he exercised absolute authority regarding the procurement and disposal of subject waste and the receipt and expenditure of the operation's money, was a member of J.V. Peters and Company, the alleged partnership and, particularly, where the rights of third parties are involved, it is immaterial whether or not he chose to refer to himself as a partner, for the reason that it is the substance, not form, of said arrangement that is determinative. As a partner, he is entitled to seek contribution from others who he may show to have been partners with him, and thus jointly and severally liable for any violations of the Act attributable to operation of subject hazardous waste facility (Nelson v. Seaboard Sur. Co., 269 F.2d 882 [CCA, MN 1959]).

5. Where a corporation is formed by members of a partnership with the intent of shielding partnership members from partnership civil penalty obligations, if a "mere transformation" is made with the real parties in interest remaining the same, no real change has taken place and creditors may look to the members of the partnership for satisfaction (Metalock Repair Service, Inc., v. Harman, 258 F.2d 809, 813[4], [6 USCA, 1958]), citing Andres v. Morgan, 62 Ohio St. 236, 245, 56 N.E. 875, 877).

6. David B. Shillman and J.V. Peters and Company were, on December 17, 1980, the owners and operators of a hazarous waste treatment and storage facility at 17030 Peters Road, Middlefield, Ohio (the "facility" or "site") pursuant to 40 CFR 260.10. Findings 1, 2, 3, 4, 17, 20, 24.

7. David B. Shillman was managing partner in a partnership styled J.V. Peters and Co., which purportedly transferred its assets and liabilities, including liabilities for noncompliance with interim status standards applicable to that facility under 42 USC 6925(e) and 40 CFR 265.1(b), to a corporation formed in January, 1981, styled J.V. Peters and Co., Inc. Findings 2, 3, 4, 6, 9.

8. David Shillman, J.V. Peters and Co., a partnership, and J.V. Peters and Co., Inc., are each jointly and severally liable for violations of the Interim Status Standards detected at the 17030 Peters Road facility under 42 USC 6925 and 6928, and 40 CFR Part 265. Findings 2, 3, 4, 9.

9. Respondents violated 40 CFR 265.13(a)(1) by failing to obtain a detailed chemical and physical analysis of representative samples of waste handled at its facility prior to treatment and storage. Findings 44, 45.

10. Respondents violated 40 CFR 265.13(b) by failing to develop and follow a written waste analysis plan. Finding 46.

11. Respondents violated 40 CFR 265.14(b) by failing to install either a barrier around the active portions of the facility or 24-hour surveillance. Findings 47, 48.

12. Respondents violated 40 CFR 265.14(c) by failing to post signs bearing the legend "Danger-Unauthorized Personnel Keep Out" at each entrance to the facility. Findings 49, 50.

13. Respondents violated 40 CFR 265.15(b) and (d) in failing to create and maintain at the facility a written inspection schedule and log. Finding 51.

14. Respondents violated 40 CFR 265.16(d) by failing to create and maintain at the facility personnel records which list the job titles and describe the type and amount of continuing and introductory training provided to each hazardous waste management person. Findings 52, 53.

15. Respondents violated 40 CFR 265.32(a) by failing to have installed an internal communications system or alarm capable of providing emergency instruction to facility personnel. Finding 55.

16. Respondents violated 40 CFR 265.32(c) by failing to maintain adequate fire extinguishers, spill control and decontamination equipment at the facility. Findings 60 through 63.

17. Respondents violated 40 CFR 265.32(d) by failing to have available at the facility water at adequate volume and pressure, or foam-producing equipment, automatic sprinklers or water spray systems. Findings 61, 62 and 63.

18. Respondents violated 40 CFR 265.34(a) by failing to have accessible, whenever hazardous waste was being mixed, poured or otherwise handled, an internal alarm or emergency communication device. Finding 65.

19. Respondents violated 40 CFR 265.35 by failing to maintain aisle space to allow unobstructed movement of personnel, fire control

equipment, spill control equipment and decontamination equipment to any area of the facility operation in an emergency. Finding 64.

20. Respondents violated 40 CFR 265.37 in that they had failed to make any arrangements with appropriate state and local emergency response officials. Findings 68, 69.

21. Respondents violated 40 CFR 265.51 through 265.56 in that they failed to create, maintain and follow a contingency plan for the facility. Findings 70, 71.

22. Respondents violated 40 CFR 265.73 by failing to create and maintain at the facility a written operating record. Finding 72.

23. Respondents violated 40 CFR 265.74 in failing to make available, upon request and at all reasonable times, all required records. Findings 73, 80.

24. Respondents violated 40 CFR 265.173(a) in failing to maintain containers of hazardous waste, not being handled or processed, in a closed condition. Findings 76, 77, 79.

25. Respondents violated 40 CFR 265.176 by storing containers of flammable hazardous waste within 15 meters (50 feet) of the property line of the facility. Finding 78.

26. Respondent does not have a permit from the State of Ohio to operate said hazardous waste facility. Findings 74, 75.

27. Respondents violated 40 CFR 265.110 through 265.115 by failing to have and to activiate a closure plan for the facility. Finding 101.

Discussion

It is stated by Counsel in Respondent's brief that David B. Shillman was not and is not now a partner in J.V. Peters and Company. On this record, while Shillman does not profess to have been and to be a partner, it is clear that he acted as an "authorizedrepresentative" of the business, operating subject facility, as he was the "person responsible for the overall operation" of same (40 CFR 260.10; Finding 24), exercising complete authority over subject operation (Findings 4, 8 and 12, supra). The representation (TR 550) that the partnership consisted only of Mrs. Brueggemyer and John Vasi (Finding 6) is not credible. Mrs. Brueggemyer had had no experience or connection with the hazardous waste business, but allegedly contributed the entire capitalization of $25,000 used primarily to purchase equipment necessary to the operation of said business as conceived by Shillman. John Vasi's main function, prior to his "termination", was to cook meals for workers (Finding 29). It must be concluded that the investment of said $25,000 was made at the instance of Shillman, who agreed to be responsible for the overall operation, thereby applying his training, skill and labors to that end. A partnership is generally created when persons join together their money, goods, labor and skill for the purpose of carrying on a trade or business for profit, and where the rights of third parties are involved, it is the substance, not the form, of the arrangement that is determinative. It is, therefore, immaterial whether Shillman professed to be a partner in determining here that he was indeed the managing partner who stood to benefit, as such, from said

operation (Nelson v. Seaboard Sur. Co., 269 F.2d. 882 [CCA, MN, 1959]).

Respondent moved (TR 412) for dismissal of subject Complaint on the ground that the named Respondent, J.V. Peters and Co., Incorporated, was not in existence on the date of the alleged violations. Subject operation was a partnership on said date, December 17, 1980, and the partners were not served with process. As a further ground for dismissal, it is argued that, aside from the "Part A Application" of Respondent, there is no evidence that hazardous waste was present on the site on that particular day. Respondent admitted in its Answer to the Original Complaint that said hazardous waste was present on the site (e.g., Paragraph 15 admits that Respondent stored containers holding ignitable and reactive waste in an area less than 15 meters from the property line and argued that Respondent is entitled to a variance due to the dimensions of said site). More importantly, Complainant made a prima facie case on said issue on showing that said notification and Part A application (C EX 7) were filed by Respondent in August and September, 1980, and Respondent then had the burden of going forward with any defense to said allegations (40 CFR 22.24). I have further concluded that the Ohio Corporation, J.V. Peters and Company, Inc., was, on this record, organized without adequate capitalization [FN9] or assets, that it was not treated by Shillman as a corporation after January 30, 1981, and that the purpose of its organization was to shield David B. Shillman and the partnership from liability for civil penalties proposed to be here assessed. Under said facts, the separate personality of the corporation should and will be disregarded and said corporation will be treated as an association of persons (Mull v. Colt Co, 31 F.R.D. 154, 165-166 [1962]; and cases cited, Conclusion of Law No. 3, p. 29, supra).

It is held in Metalock Repair Service, Inc. v. Harman, 258 F.2d. 809, 1.c. 813(4), citing Andres v. Morgan, 62 Ohio St. 236, 245, 56 N.E. 875, 877, that where a corporation is formed by the members of a partnership with the intent of defrauding partnership creditors, if a "mere transformation" is made with the parties remaining the same, no real change has taken place and the creditors look to the same persons for satisfaction. Said case speaks to the facts here presented. On this record, Shillman and Brueggemyer joined their money, skills and labor together to carry on said business of operating said facility.

It is obvious that the participation of John Vasi was as a nominal partner, at most, as no contribution of either money, skills or management effort is shown, and he was "terminated" peremptorily in December, 1980, without any indication that his purported partnership interest was of any value. Likewise, Angelo Colon served as Plant Manager in 1980 and, though he ostensibly received qualifying shares (R EX 11) of no par stock, and was listed as a corporate director in January, 1981, when said corporation was organized, absolute authority to manage the corporate affairs, including the finances, was immediately delegated to David Shillman. Robert Warner left the corporate board in 1983 (as a corporate creditor) and was replaced by Brueggemyer. Again, it is clear that Brueggemyer and Shillman were the source of the capital and management of the business, and that said other persons served passively and nominally, as they had no voice in management, and there is no showing that they could expect to share in any profits which might be realized from said operation.

Complainant urges (TR 43) that we find that the pleadings have been amended to conform to the evidence and that Rule 15(b) and (c) of the Federal Rules of Civil Procedure (Title 28) be invoked and that David B. Shillman and J.V. Peters and Company, the partnership, also

be added as parties Respondent. The suggestion has merit but it would appear that Rule 15 actually codifies what has been declared by the courts to be the applicable law. I find that David B. Shillman acted as counsel and shouldered the overall managerial responsibility of said hazardous waste management facility, hiring counsel and professional advisors, and was the moving party in preparing the defense offered herein and participated in presentation of said defense by his appearance as a witness to testify to the facts in issue and, thus, entered his appearance as a party herein. Under such circumstances, there was no need or necessity to issue a summons for him or to amend pleadings to make him a new party as he was already appearing in the case by counsel (Ocean Accident and Guarantee Corp., Ltd., et al v. Felgemaker et al., 143 F.2d. 950, CCA, 6th Cir., 1944; 47 F.S. 660, 663 [5]).

At the conclusion of the hearing in Cleveland, Ohio, on October 25, 1984, the parties were directed to simultaneously file their proposed Findings of Fact, Conclusions of Law, Brief and Argument on or before December 28, 1984, and their respective replies thereto on or before January 10, 1985. At the joint request of the parties, the date for the first filing was extended to January 11, 1985. On February 6, 1985, neither of the parties had filed any post- hearing briefs and the parties were notified that they were not required by the regulations to file post-hearing proposed findings, etc; however, since both had indicated that they desired to so file, I advised that if said filings were not made by February 21, 1985, I would assume that none would be filed. My secretary was advised, first by Complainant Counsel's office and later by Respondent Counsel's office, that they each desired to file their post-hearing briefs. Complainant's brief was received by me on February 12, 1985, with the advice of Counsel that he had filed same with the Regional Hearing Clerk, along with Respondent's copy, with instructions to the Regional Hearing Clerk that Respondent's copy

should be mailed to Respondent's Counsel when Respondent's brief was received by the Regional Hearing Clerk. Respondent's Counsel's communication, through his secretary, on or about February 21, 1985, advised that he intended to mail his brief on February 25, 1985. However, I did not receive Respondent's brief until March 19, 1985. Through a succession of motions filed, dating from April 18, 1984, there has been a continuous exchange between Counsel, including additional discovery requests, motions regarding the time and place of the hearing, and motions to compel discovery and to impose sanctions. I find that the parties adequately responded to discovery requests for the reason that either valid objections were made to the request on the ground of materiality or the information requested was furnished. It should suffice to point out that Respondent's requests respecting Superfund studies and activities at the subject site are not here material. The exchange between Counsel, as recently as May 10, 1985, complains of "tardiness" of opposing Counsel, and requests that certain contentions of opposing Counsel be excluded. Such requests are denied. The public interest in this matter far outweighs the derelictions of Counsel. Both Counsel have filed post-hearing documents later than directed and without respect to time frames provided by regulation. The principles contended for are intended to promote fairness and prevent injustice. It would indeed seem unfair and unjust to strike such submissions at the behalf of a complaining party who was guilty of the identical demeanor and dereliction complained of. Further, there has been no showing that either party has been prejudiced.

I have considered the entire record, including the motions, briefs and proposals of the parties, and any argument, suggestion or finding therein not ruled by or inconsistent with this decision is hereby overruled.

Civil Penalties

In assessing the civil penalties, I have given consideration to 40 CFR 22.27(b) which provides:

> "(b) Amount of civil penalty. If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease . . . "

Section 3008(c) of RCRA, 42 USC 6928(c) provides the criteria for penalty assessment, stating:

> "Any order issued under this section . . . shall state with specificity the nature of the violation and specify a time for compliance and assess a penalty, if any, which the administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements."

I have reviewed memoranda developed in EPA Headquarters, entitled, respectively: "Penalty Policy [FN10] for RCRA Subtitle C

Violations, Guidance on Developing Compliance Orders Under Section 3008 of RCRA", and "Guidance of Application of Interim Status Standards . . . "

Said Penalty Policy classifies Subtitle C violations (both statutory and regulatory) into three groups, with Class I and II violations being the most serious. A penalty matrix is created for each such group. One axis of each matrix requires a determination of the potential harm which could occur from a particular violation, while the other axis involves an assessment of the degree to which the violator's conduct deviated from the regulatory requirements. Each axis is divided into three categories: Major, Moderate and Minor, in descending order of seriousness. Each cell thus created contains a limited range from which the base penalty amount is to be chosen. Factors, which permit an adjustment to said base penalty amount, pertain to actions or failures to act on the part of the violator, such as history of prior violations and remedial action voluntarily taken.

At the hearing, Dr. David Homer was called as an expert witness and testified that, under said Penalty Policy, he determined that an appropriate base penalty (using said matrices in the manner above described; see Complainant's Exhibit 8) totaled $79,675. [FN11]

As shown by Complainant's Exhibit 8, such figure was arrived at by determining as to each violation found the class of the violation, what potential damage could result, and assessing the "conduct deviation" of the violator. Each such finding determined whether the violation, within the class determined, was major, moderate or minor, whereupon a penalty amount was selected from the matrix (TR 345). Dr. Homer considered Respondent's operational history (TR 342); that subject facility was not in operation after May, 1981, and that the

violations noted by subject inspection persisted (except for the reported posting of a security guard on December 20, 1980), up to that time. Upon consideration of such facts, no adjustment was made to the base penalty provided by the matrix (TR 346). Dr. Homer, along with Counsel and his supervisors, noted that penalties awarded by Initial Decisions usually amount to about one-third of the base penalty (TR 346) and, for that reason, cut the amount of the penalty to be proposed to $25,000.

I have considered Dr. Homer's testimony and his assessment of the violations as set forth in detail in Complainant's Exhibit 8.

In addition, I have considered said guidelines, Respondent's operational history, the seriousness of the violations found and the conduct of the operators with respect to their efforts to comply with the applicable regulations. I find no reason to increase or decrease the $25,000 penalty proposed by Complainant, and recommend that said amount be assessed. By reason of the foregoing, I recommend issuance of the following

FINAL ORDER [FN12]

. Pursuant to Section 3008(c) of the Act, 42 USC 6928(c), a civil penalty in the total sum of $25,000 is hereby assessed against the Respondent, David B. Shillman, individually and as managing partner of J.V. Peters and Company, a partnership.

2. Payment of the full amount of the civil penalty assessed shall be made, within 60 days of the Service of the Final Order upon Respondent, by forwarding a Cashier's or Certified Check payable to the Treasurer, United States of America, to:

EPA - Region V
(Regional Hearing Clerk)
P.O. Box 70753
Chicago, Illinois 60673.

IT IS SO ORDERED.

Marvin E. Jones
Administrative Law Judge

FN1 Complainant, in its Brief, agrees that the requirement in Section 265.32(b) was met; it concedes the existence of telephones at the site (see Complainant

FN2 Complainant's witness testified that during the course of the inspection on December 17, 1980, she asked to see a detailed analysis of waste materials handled at Respondent's facility and was told that no such document then existed. (TR 53, 592.)

FN3 Testimony at the hearing reflects that a security guard was posted at the sit on December 20, 1980, and was maintained until summer or early fall, 1981 (TR 448.)

FN4 Testimony at the hearing was to the effect that such documents did not exist. (TR 64-68; 566.)

FN5 No such documents were then in existence. (TR 7; 566-567.)

FN6 Complainant admits that a telephone was made available and excised said charge of violation from its Complaint. (Complainant Brief at 13.)

FN7 Complainant admits that fire extinguishers were available at subject facility (Complainant Brief at 13), but contends that they were inadequate to deal with other than minor fires and did not satisfy the regulation.

FN8 Said regulations were promulgated, pursuant to 42 USC 6921 et seq., on May 19, 1980. Under s3010 of RCRA, 42 USC 6930, the effective date of the regulations (40 CFR Parts 260-265) was six months later, or November 19, 1980. This was done in order to afford facilities, subject to said regulations, adequate time to come into compliance and to obtain interim status in lieu of a final permit (see 42 USC 6925[e]).

FN9 Said corporation purported to begin business with $500 cash and "thousands of dollars" in liabilities (Findings 14 and 15). West v. Costen 558 FS 564, 585 (44) states:

> "Undercapitalization, coupled with disregard of corporate formalities, lack of participation on the part of other shareholders and failure to pay dividends while paying substantial sums whether by salary or otherwise, all fitting into a picture of basic unfairness, has been regarded fairly uniformly to constitute a basis for the imposition of individual liability under the doctrine . . . "

At l.c. 586 (46, 47), West v. Costen further states:

". . . undercapitalization is a ground for piercing the corporate veil because it is the policy of the law that shareholders should in good faith put (into) the risk of the business capital reasonably adequate for its prospective liabilities", citing Ballentine on Corporations, 302-303 (1946 ed.).

In addition to the finding of undercapitalization of the corporation (Findings 14 and 15), it is further found that J.V. Peters and Co., Inc., was not at all times treated by its principals as a corporation. U.S. EPA and Ohio EPA were never given formal notice of a change in ownership as required by 40 CFR 270.72(d) (Finding 27); said operations were continued under the new name without change in those operations (Findings 3, 28); Shillman exercised the same absolute authority (Findings 9 through 13); correspondence was prepared and mailed by David Shillman, after January 30, 1981, on "partnership" stationery with no indication

FN10 The Final Penalty Policy developed by the Agency, dated May 8, 1984, is not here applicable as it applies to "RCRA Administrative actions instituted after the date of the policy" (page 2 thereof).

FN11 It is noted that the testimony (TR 345) varies from Complainant's Exhibit 8 in stating that the total penalty calculation was $70,675.00.

FN12 40 CFR 22.27(e) provides that this Initial Decision shall become the Final Order of the Administrator within 45 days after its Service upon the parties unless (1) an Appeal is taken by a party to the proceedings, or (2) the Administrator elects, sua sponte, to review the

Initial Decision. 40 CFR 22.30(a) provides that such Appeal may be taken by filing a Notice of Appeal within 20 days after Service of this Decision.

1985 WL 57141 (E.P.A.)

Supreme Court, U.S.
FILED
DEC 06 2000
CLERK

(3)

No. 00-514

In the Supreme Court of the United States

J.V. PETERS & COMPANY AND DAVID B. SHILLMAN, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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17pp

QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency's action was time-barred when EPA's motion to amend was filed within the limitations period.

2. Whether an administrative law judge's decision to allow witnesses in a 1994 hearing to adopt testimony from a prior hearing in the same action, when opposing counsel had the opportunity to cross-examine the witnesses at both hearings, comported with the requirements of due process.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is unpublished, but the decision is noted at 221 F.3d 1336 (Table). The opinion of the district court (Pet. App. A20-A41) is unreported.

Earlier decisions, both administrative and judicial, may be found in the Supplemental Appendix (Supp. App.) to the petition for a writ of certiorari. They are the following decisions:

In re J.V. Peters & Co., Environmental Appeals Board Appeal No. 95-2, 1997 WL 221388 (Apr. 14, 1997)

In re J.V. Peters & Co., Initial Decision on Court Remand in Docket No. V-W-81-R-75, 1995 WL 442019 (EPA July 18, 1995)

J.V. Peters & Co. v. *Reilly*, Case No. 1:90 CV 2246, slip op. and order (N.D. Ohio 1991)

J.V. Peters & Co. v. *Reilly*, 923 F.2d 854 (6th Cir. 1990) (Table)

In re J.V. Peters & Co., Final Decision of EPA's Chief Judicial Officer in Docket No. V-W-81-R-75, 1990 WL 303851 (Aug. 7, 1990)

In re J.V. Peters & Co., Initial Decision of the Administrative Law Judge After Remand from EPA's Chief Judicial Officer in Docket No. V-W-81-R-75, 1988 WL 236321 (Sept. 26, 1988)

In re J.V. Peters & Co., Inc., EPA's Chief Judicial Officer's Decision on EPA's Motion for Reconsideration in Docket No. V-W-81-R-75, 1986 WL 69034 (Oct. 23, 1986)

In re J.V. Peters & Co., Inc., Remand Order issued by EPA's Chief Judicial Officer in Docket No. V-W-81-R-75, 1986 WL 69028 (May 9, 1986)

In re J.V. Peters & Co., Inc., Initial Decision of the Administrative Law Judge in Docket No. V-W-81-R-75, 1985 WL 57141 (EPA May 15, 1985)

JURISDICTION

The judgment of the court of appeals was entered on June 29, 2000. The petition for a writ of certiorari was filed on September 27, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a now-defunct hazardous waste storage and reclamation facility in Middlefield Township, Ohio. Petitioners are David Shillman, the former manager of the facility, and J.V. Peters & Co. (the Partnership), the partnership that began operating the facility in June 1980. The two partners were Shillman's wife, Dorothy Brueggemeyer, and John Vasi.

In December, 1980, an Ohio Environmental Protection Agency inspector reported to the federal Environmental Protection Agency (EPA) multiple violations at the facility of hazardous waste storage and handling requirements of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.*[1] Pet App. A2-A3. A copy of the inspection report was sent to the Partnership. *Id.* at A3. Two weeks later, the partners dissolved the Partnership and transferred its assets and liabilities to a newly formed corporation, J.V. Peters and Company, Inc. (the Corporation). Shillman became the president and chairman of the board of directors for the Corporation and Brueggemeyer be-

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[1] These violations are detailed at Supp. App. A234-A237, and include failing to obtain a physical analysis of representative samples of waste prior to treatment and storage; failing to take adequate and required safety precautions; operating the hazardous waste facility without a permit; not fencing the facility; failing to keep adequate records; failing to maintain containers of hazardous waste in a closed condition; and failing to make appropriate filings and arrangements with appropriate emergency response officials.

It later became necessary for EPA to undertake a CERCLA removal action at the site because of the release or threatened release of hazardous substances presenting an imminent and substantial danger to the public health or welfare. See *J.V. Peters & Co., Inc.* v. *Ruckelshaus*, 584 F. Supp. 1005, 1007-1008 (N.D. Ohio 1984), aff'd, 767 F.2d 263 (6th Cir. 1985).

came the secretary, the treasurer, and a member of the board. The business of the Corporation was identical to that of the Partnership. *Ibid.*

2. Based on the inspection report from the Ohio agency, EPA filed an administrative complaint against the Corporation, assessing a $25,000 civil penalty. Pet. App. A3. In 1984, EPA filed an amended complaint, which again named only the Corporation as defendant. *Id.* at A3-A4. At a three-day evidentiary hearing before an EPA administrative law judge (ALJ) in October 1984, petitioners' attorney vigorously and thoroughly cross-examined EPA's two witnesses. Shillman testified as a witness for the Corporation, admitting that the facility was in violation of RCRA when the inspection was conducted. His testimony also established that, at the time of the inspection, the facility was owned by the Partnership and that the Corporation had not yet been formed. Shillman described the transfer of all Partnership assets and liabilities to the Corporation, which was created on January 30, 1981, and affirmed that the business of the Corporation was the same as the business of the Partnership. Supp. App. A51-A52.

In April 1985, EPA filed a motion to amend its complaint in order to add the Partnership and Shillman as respondents. Pet. App. A24. The motion did not seek to add Brueggemeyer. *Ibid.* The ALJ did not expressly rule on this motion, but instead, on May 15, 1985, issued a decision (Supp. App. A201-A248) holding the Partnership, the Corporation, and Shillman liable for the violations at the facility and assessing a civil penalty of $25,000. Pet. App. A24.

3. The Corporation, Partnership and Shillman appealed the ALJ's decision to EPA's Chief Judicial Officer (CJO). On May 9, 1986, the CJO (Supp. App. A186-A200) held that the ALJ erred by imposing lia-

bility on the Partnership and Shillman when they were not named in the complaint and remanded the matter to allow EPA to amend its complaint and to give Shillman and the Partnership an opportunity to present their defense. Pet. App. A5.

4. On remand, EPA filed a second amended complaint in November 1987, naming as respondents the Corporation, the Partnership, Shillman, Brueggemeyer, and Vasi. Pet. App. A5. Those respondents, except Vasi,[2] answered, denying the violations and asserting that the claim was barred by 28 U.S.C. 2462, which they read as requiring that an action to enforce a civil penalty be commenced within five years after the claim arises. Pet. App. A25. EPA moved for an accelerated decision, the "administrative equivalent of summary judgment," *id.* at A6, based on the testimony and evidence from the 1984 hearing and upon the admissions in the answer to the original complaint. *Ibid.* On September 26, 1988, the ALJ granted this motion (Supp. App. A167-A180) and found Shillman, Brueggemeyer, Vasi, and the Partnership liable for the violations and for a penalty of $25,000. Pet. App. A25-A26. The ALJ rejected the statute of limitations defense. *Id.* at A26. On appeal, the EPA's CJO affirmed (Supp. App. A141-A166). Pet. App. A6.

5. Shillman, Brueggemyer and the Partnership appealed the decision to federal court. The United States District Court for the Northern District of Ohio (Supp. App. A120-A138) affirmed that the statute of limitations was not a bar. Pet. App. A7. However, reasoning that 42 U.S.C. 6928(b) required a public hearing, the district court set aside the fine and remanded the case

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[2] Vasi never answered this complaint, and so a default decision was entered against him. Supp. App. A175.

"to the ALJ to conduct an evidentiary hearing on respondents' potential liability for the $25,000 civil penalty assessed against them in the USEPA's Second Amended Complaint." Supp. App. A136.

6. On remand, an ALJ conducted a public hearing on October 3, 1994. In a letter to all counsel in September 1993, the ALJ established the hearing format, allowing EPA to present the direct testimony of its witnesses by submitting transcripts of their testimony at the 1984 hearing and requiring EPA to make these witnesses available for cross-examination. Supp. App. A45-A47. After EPA's first witness, the Ohio EPA inspector, testified to reaffirm her 1984 testimony, Shillman, Brueggemyer and the Partnership declined to cross-examine her. They also indicated that they would not cross-examine EPA's second witness who was going to reaffirm his 1984 testimony, so the ALJ concluded that it was not necessary for that witness to appear. *Id.* at A46. EPA attempted to call Shillman to testify, but he refused. The ALJ then allowed EPA to introduce into evidence the transcript of Shillman's testimony from the 1984 hearing. Shillman, Brueggemeyer, and the Partnership rested their case without presenting any evidence. *Ibid.*

The ALJ, reviewing the prior testimony submitted into evidence *de novo*, found (Supp. App. A93-A119) that the evidence was sufficient to find Shillman, Brueggemyer and the Partnership jointly and severally liable for all but one of the alleged violations and assessed a penalty of $23,500. Pet. App. A7. On appeal, the Environmental Appeals Board (the successor to the role of the Chief Judicial Officer) affirmed (Supp. App. A42-A92). The Board held that the federal district court's determination that EPA's complaint was not time-barred was the "law of the case" and held that the

prior testimony was "probative, relevant, and reliable" and thus properly admissible and not a violation of due process. Pet. App. A8.

7. Shillman, Brueggemeyer and the Partnership again sought judicial review. The district court (Pet. App. A20-A41) reaffirmed its earlier determination that the Second Amended Complaint was not barred by the statute of limitations, *id.* at A33-A36, and found that the 1994 hearing before the ALJ was conducted "in accordance with the Court's 1991 Opinion requiring that the petitioners be given the 'opportunity to present evidence' in defense of the penalty assessed against them," *id.* at A39.

8. On June 29, 2000, the court of appeals held that Shillman and the Corporation had failed to answer candidly the substance of the averments made in EPA's initial complaint against them, and should have disclosed in a more timely manner the difference between the Partnership and the Corporation. Pet. App. A9-A11. The court held that EPA's action against petitioners was not barred by the statute of limitations because EPA's April 15, 1985 motion "To Conform Pleadings to Proofs" was filed "within five years of the alleged violations" and, although not a formal amended complaint, EPA's April 15 motion was essentially a motion for leave to amend which "itself may be acceptable so long as it puts the opposing party on notice of the content of the amendment." *Id.* at A12-A13 (quoting *Moore* v. *Indiana*, 999 F.2d 1125, 1131 (7th Cir. 1993)). The court found that there was "little doubt" that the motion, as well as other developments in the proceedings, put Shillman and the Partnership on notice that EPA was intending "to proceed against them." *Id.* at A12. Because the April 15 motion did not mention Brueggemeyer, however, the court concluded

that "it does not appear that EPA did anything to add her as a party during the five-year limitations period" and thus reversed the finding of liability against her. *Id.* at A14.

The court also held that the 1994 hearing before the ALJ satisfied due process. Rejecting petitioners' contention that it was improper to allow the adopted 1984 hearing testimony into evidence, the court noted that Shillman participated in the 1984 hearing; that Shillman and the Corporation had every incentive to challenge that testimony because the Corporation "expressly assumed all of the partnership's liabilities;"[3] and that the same lawyer represented petitioners in the 1984 and 1994 hearings. Pet. App. A14-A15. The court also noted that in the 1994 hearing petitioners "were given the opportunity to cross-examine the EPA's witnesses, to present evidence that the violations did not occur, or to show that they should not be held responsible if they did occur [but] did none of these things." *Id.* at A15.

Judge Wellford dissented with regard to the statute of limitations issue. He concluded that EPA's Second Amended Complaint filed in November 1987 was the relevant filing for limitations purposes and that it was filed more than five years after the alleged violations. Pet. App. A17-A19.

ARGUMENT

The court of appeals correctly ruled that the EPA's action was not time-barred and that submitting prior testimony into evidence in the 1994 administrative hearing did not violate principles of due process. Those

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[3] Indeed, the court of appeals was "at a loss to understand why the ALJ [in the 1985 decision] did not simply impose successor liability" on the Corporation. Pet. App. A11; see also *id.* at A15.

rulings do not conflict with any decision of this Court or another court of appeals and do not warrant further review.

1. Petitioners contend (Pet. 19-24) that the court of appeals' application of the doctrine of "relation back" conflicts with this Court's holding in *Schiavone* v. *Fortune*, 477 U.S. 21 (1986). *Schiavone* involved "relation back" under the Federal Rules of Civil Procedure (FRCP), which do not bind EPA administrative proceedings, see Pet. App. A6 (citing *Sloan* v. *SEC*, 547 F.2d 152, 155 (2d Cir. 1976), cert denied, 434 U.S. 821 (1977)). For that reason alone, this case does not conflict with decisions such as *Schiavone* that interpret the FRCP.

But petitioner's assertion of a conflict misses the mark for an even more fundamental reason. The court of appeals did not apply any type of "relation back" doctrine to EPA's administrative action. As it noted, "discussion of the 'relation back' doctrine is misplaced." Pet. App. A12. Rather, the court found that when EPA filed its motion "To Conform Pleadings to Proofs" on April 15, 1985, a date "within five years of the alleged violations," the agency "formally requested permission to proceed" against Shillman and the Partnership. *Ibid.* The court then concluded that such a motion satisfies the five-year limitations period governing EPA's administrative action. *Ibid.* The court of appeals was quite explicit that this was the basis for its holding. *Id.* at A12-A13. The court's decision to dismiss the case against Brueggemeyer, because she was not named in the April 1995 motion, eliminates any further doubt that could exist regarding the court's rationale. *Id.* at A14. Brueggemeyer was named in the Second Amended Complaint, *id.* at A5—the filing that petitioners believe the court found to "relate back" to the

original complaint—so the court would have treated her the same as Shillman and the Partnership if it had found that it was the Second Amended Complaint that satisfied the statute of limitations.

At the end of their statute of limitations discussion, petitioners acknowledge that the court of appeals actually decided that the April 1985 motion satisfied the limitations period. Pet. 23-24. Petitioners contend this decision was erroneous because EPA never filed an amended pleading with the motion. Pet. 24. They cite no case, however, holding that an amended pleading must accompany a motion to add parties in order to satisfy the statute of limitations in an administrative proceeding. In federal court practice, timely motions to add parties can satisfy the statute of limitations, even when the amended complaint is not filed within the limitations period. See, *e.g.*, *Mayes* v. *AT&T Info. Sys., Inc.*, 867 F.2d 1172, 1173 (8th Cir. 1989) (per curiam); *Rademaker* v. *E.D. Flynn Export Co.*, 17 F.2d 15, 17 (5th Cir. 1927); *United States* v. *City of Toledo*, 867 F. Supp. 603 (N.D. Ohio 1994); *Christiana Gen. Ins. Co.* v. *Great American Ins. Co.*, 745 F. Supp. 150 (S.D.N.Y. 1990); *Chaddock* v. *Johns-Manville Sales Corp.*, 577 F. Supp. 937 (S.D. Ohio 1984).

Petitioners also contend that the April 1985 motion was not a motion to amend the complaint and add parties, Pet. 24, but cites no evidence indicating that the court of appeals' conclusion to the contrary was clearly erroneous. In fact, the motion to amend was accompanied by a memorandum that described EPA's arguments for adding the Partnership and Shillman. See Memorandum in Support of Motion to Conform Pleadings to Proofs, *In re J.V. Peters & Co., Inc.*, Docket No. V-W-81-R-75 (Region V, EPA). The motion and accompanying memorandum were served on the

same attorney currently representing the petitioners, thereby providing clear notice to the petitioners, within the limitations period, of the substance of the proposed amendment. Moreover, in addition to the April 1985 written motion, EPA made an oral motion at the October 1984 hearing to amend its complaint. Hearing Transcript, *In re J.V. Peters & Co., Inc.*, Docket No. V-W-81-R-75 (Oct. 1984), at 43. This oral motion also was sufficient: "Leave to amend also may be requested in open court instead of by formal motion. Courts have held that an oral request to amend a pleading that is made before the court in the presence of opposing party's counsel may be sufficient if the adverse party is put on notice of the nature and purpose of the request and is given the same opportunity to present objections to the proposed amendment as he would have if a formal motion had been made." 6 Charles Alan Wright et al., *Federal Practice and Procedure* § 1485 (2d. ed. 1990).[4]

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[4] Even if the Federal Rules of Civil Procedure applied in EPA administrative actions, and even if the April 1985 motion did not satisfy the statute of limitations, the Second Amended Complaint filed in 1987 would relate back and satisfy the limitations period. Petitioners concede that the first two *Schiavone* requirements were met—that "the basic claim must have arisen out of the conduct set forth in the original pleading [and] the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense," 477 U.S. at 29. Pet. 20. Petitioners argue, however, that "relation back cannot occur here because none of the Petitioners knew, or should have known, that EPA would have sued them but for a mistake in identity." *Ibid.* The court of appeals found just the opposite. It concluded that petitioners engaged in an "intentional litigation tactic" to conceal from EPA the fact that the agency named the successor-in-interest Corporation in the original complaint, Pet. App. A9, and that after the 1985 motion, there was "little doubt that Shillman and J.V.

2. Contrary to petitioners' suggestion (Pet. 25-27), the ALJ's decision to admit testimony at the 1994 hearing from the earlier 1984 hearing did not violate petitioners' due process rights. Petitioners cite no case holding that a witness's adoption in an administrative hearing of prior testimony, when the adverse party had ample opportunity and incentive to impeach the prior testimony, gives rise to a due process violation. The district court in 1991 remanded this action because it found that 42 U.S.C. 6928(b) required a hearing at which Shillman, Brueggemeyer, and the Partnership "are given the opportunity to present evidence in their own defense." Supp. App. A136. A hearing was held at which the ALJ afforded Shillman, Brueggemeyer and the Partnership that opportunity, but they declined to exercise it. The district court did not require anything more. Nor does the Due Process Clause. As this Court has explained, the "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Matthews* v. *Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)).

The 1984 testimony is not even testimony from a different case or an out-of-court written statement —both of which the Federal Rules of Evidence permit in certain circumstances and are not thought to violate due process, see, *e.g.*, *In re Adair*, 965 F.2d 777 (9th Cir. 1992). The 1984 testimony is evidence presented earlier in the *same* administrative action.[5] It is often the case

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Peters & Co. knew or should have known that the EPA" intended to proceed against them, *id.* at A12; see also *id.* at A35-A36, A151-A152.

[5] Although an ALJ dismissed the case in 1987, in September of that year the ALJ granted EPA's motion for relief from the

that judicial or administrative bodies, after an appeal and remand, continue to consider evidence submitted before the remand, when the appellate decision did not call into question the reliability of that evidence. Petitioner points to nothing that makes this practice constitutionally suspect.

Moreover, petitioners had ample procedural protections. As the court of appeals noted, petitioners had the opportunity and motivation to cross-examine the government's witnesses at both the 1984 and 1994 hearings. Pet. App. A15. And, well in advance of the hearing, the ALJ informed petitioners that EPA would be allowed to resubmit the 1984 testimony and provided petitioners with those portions of the testimony that EPA intended to rely on.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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dismissal and allowed EPA to submit a "Second Amended Complaint," thus continuing the administrative action that commenced in April 1981.